

ADD WOMAN AND STIR

**The Applicability of the Theories of Distributive Justice of Rawls and Dworkin to Social,
Political and Economic Equality for Women**

by

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This thesis contains no material which has been accepted for the award of any other higher degree or graduate diploma in any tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except when due reference is made in the text.

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ABSTRACT

Liberal theory depends for such coherence and consistency as it possesses upon the exclusion of human relationships from its theoretical structure. Classic social contract theory affirmed a contract between households, not individuals, each household being represented by its male head. This theoretical structure guaranteed a realm of private freedom to all (male) individuals and precluded the extension of legal principles to family life. To the extent that the premises of such theories are accepted, including the existence of a marital contract which pre-existed the social contract and eradicated the civil capacity of women, a foundation was available for a coherent regime of family law affirming masculine interests. The relegation of human relationships to the private sphere enabled the affirmation of autonomy and independence. The legal relationship between the head of the household and his wife and children was proprietary, and it was this proprietary connection upon which the doctrine of family privacy depended.

Contemporary liberal egalitarian theorists such as Rawls and Dworkin face very different problems. While women are now fully part of civil society and rank equally as citizens, neither has considered the full implications of that recognition for the distinction both wish to sustain between the public and private spheres. Rather, they have introduced a new theoretical distinction and argue that they have broken with the pre-suppositions of classic liberal theory in seeking to offer an account of justice which is political merely and devoid of wider epistemological and metaphysical assumptions. By arguing that their account of the individual is entirely political, applies only to the individual as citizen, they seek to distance themselves from the traditional liberal account of the individual as autonomous and independent and defeat communitarian claims that liberalism is hostile towards certain conceptions of the good life. The compartmentalization implied by such an account of justice, its explicit denial that roles other than that of citizen are relevant to equality, renders it irrelevant to women.

It is argued that to the extent that women of every social class remain less advantaged than their male counterparts, the foundation of their inequality lies in the gender roles characteristic of our culture and the normative role these play in legal and political institutions. Both Dworkin and Rawls tacitly assume the male gender role characteristic of late capitalist society as normative. This renders the inequality of women invisible, characterizes it as a product of individual choices in work, leisure and consumption. To the extent that the theoretical individual is recast in gender neutral terms, compelling recognition of the fact that the 'private responsibilities' associated with the female gender role form the foundation for economic and social inequality, the distinction between public and private is collapsed and an account of the just family becomes essential. When an account of the just family is constructed, using the premises of egalitarian theory as the foundation, it becomes essential to

extend ordinary legal principles to the family. This move, in turn, compels acknowledgment of the fact that, at least with respect to women and the family, the concrete tastes and preferences liberalism seeks to affirm have their roots in the inegalitarian attitudes it deems illegitimate.

CHAPTER 1

WOMEN AND JUSTICE - PRIVATE LIVES AND PUBLIC STANDARDS

HUMAN RELATIONSHIPS AND JUSTICE

All people spend a majority of their lives involved in more or less intimate relationships with others. Many of these relationships are conventionally subsumed under the rubric of family relationships. Within families obligations exist, goods and services are exchanged, and more or less complex social hierarchies govern relationships. Much contemporary political philosophy disregards such relationships in its analysis of the form and content of a just social order. By convention, it concentrates upon the relationships which are appropriate among relative strangers and seeks to define the principles which ought to govern these. Often, these strangers are simply referred to as citizens. Thus, political philosophy, by convention, concerns itself with just relationships among citizens and between individual citizens and the state.

A central thesis in the arguments which will be presented subsequently is that the conventional approach is both inadequate and seriously misleading. These difficulties are particularly marked in non-utilitarian egalitarian accounts.¹ Today all adult family members, men and women alike, rank equally as citizens and are entitled to have their individual interests respected and secured by the state. It is important to remember that this is a comparatively recent phenomenon. Until very recently, women did not have a voice in the democratic political process, nor, if married, were their interests deemed to be independent of those of the male head of household. While, as a matter of political theory, women are fully citizens, and, as such, share equally in the responsibilities and benefits of citizenship, as a matter of practical social reality and the tacit conventions of family life, women remain profoundly disadvantaged. Cultural traditions which remain deeply entrenched in countries such as England, Australia and the United States assign women primary social responsibility for domestic labour and parenting. As a matter of popular ideology, the 'normal' family is comprised of a male breadwinner, a female homemaker and two or three children. Many women are, therefore, socially and economically disadvantaged because, irrespective of labour market participation, they remain disproportionately responsible for domestic labour. This

¹ Contemporary examples of such accounts include, but are not limited to, those being developed by John Rawls, Ronald Dworkin, Bruce Ackerman, and, perhaps, Michael Walzer. See, eg., J. Rawls, *A Theory of Justice*, Oxford, Oxford Univ. Press, 1972, and the more recent articles developing and further refining his basic theory noted in the Bibliography, R. Dworkin, esp. 'What is Equality? Part 1: Equality of Welfare', 10 *Phil. and Pub. Aff.*, 185 (1981), 'What is Equality? Part 2: Equality of Resources', 10 *Phil. and Pub. Aff.* 283 (1981), 'What is Equality? Part 3: The Place of Liberty', 73 *Iowa L.R.* 1 (1987), and 'What is Equality? Part 4: Political Equality', 22 *Univ. Of San Francisco L.R.* 1 (1987), B. Ackerman, *Social Justice in the Liberal State*, New Haven, Yale Univ. Press, 1980, and M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford, Martin Robertson, 1983.

'double burden', in practice, frequently limits their access to resources through their participation in the labour market. Women who do not participate in the labour market typically lack independent access to resources altogether, and, under most current legal regimes have no entitlement to resources beyond those which the male breadwinner elects to make available.² Effectively, their access is derivative, not primary. Should the marital or quasi-marital relationship fail, this history of diminished, sporadic or effectively non-existent labour market participation ensures that they will remain disadvantaged unless they are both willing and able to secure the support of another male breadwinner.

When family relationships are ignored by egalitarian political theories, the nature, pervasiveness, and persistence of these patterns of economic disadvantage are also disregarded. While egalitarian theorists recognize that, on a practical level, women disproportionately require redistributive assistance, their failure to address the justice of family relationships in general and of the economic structures which form a significant part of those relationships in particular, suggests that this is perceived as an unimportant, if unfortunate, fact. Given the pervasiveness of family structures, this inattention is remarkable. Because family members are also citizens, and because the distributive patterns within families and the hierarchies which are conventional within many families have a pervasive effect upon the resources available to family members and upon their public equality, both while particular families subsist and following their dissolution, egalitarian political theory can ill afford to exclude family relationships from its account of a just social order. During the analysis which follows, I shall apply the principles of distributive justice offered by two leading egalitarian theorists, Dworkin and Rawls, to basic human relationships and endeavour to determine the degree to which their application to family relationships creates tension within the theoretical structure as a whole. Central to the structure of this endeavour is an effort to establish whether present liberal egalitarian approaches to distributive justice have the capacity to secure just social and economic outcomes for women or whether, as seems likely, any attempt to apply them to women will collapse the boundary between private lives and public persons central to liberal theory.

Issues of justice arise within the family as it is understood by our culture in three distinct dimensions. These dimensions are a consequence of our cultural conventions concerning the division of responsibilities within families and the particular social and economic role the family plays with respect to the wider society. Thus, in what follows, I shall primarily consider the particular forms of family life which have emerged in the late Twentieth Century, the internal structures of family life associated with such cultures, and the ways in which these family structures interact with wider cultural, social, legal, economic and political

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In Australia s. 72 *Family Law Act* 1975 has been interpreted as allowing the court to make an award of maintenance to the dependent spouse even though the parties to the marriage continued to live together. See *Eliades and Eliades* (1981) F.L.C. 91-022.

structures. The first dimension of justice with respect to families is wholly internal to family structures and deals with the conduct of family members with respect to other family members. From an egalitarian perspective, it is proper to question whether both the burdens and benefits of family life are equitably allocated among adult members. The ways in which responsibilities and entitlements are distributed within the family substantially determines the capacity of its members to participate in the structures of the wider society. Likewise, again primarily with respect to adult individuals, we must question whether individual family members enjoy equal autonomy and independence. Thus, we might ask whether decisions are made in a way which accords adult members equal decision making capability and authority or whether over-reaching occurs which constrains the decision making capability of one individual in an unjust manner. Finally, because normal individuals retain the capacity to grow and to change throughout their lives, we may ask whether family structures allow equal opportunities for personal development and self-realization to all family members. Another way of putting this last question is to ask whether all family members are allowed the opportunity to grow in all dimensions of human life - in their capacity to enhance and sustain caring relationships, in their capacity to achieve instrumental mastery of their political, social and economic environments, and in their capacity to attain control over the circumstances of their own lives. It is necessary to question whether family structures as they have evolved in England, Australia and the United States foster or impede the flourishing of the human individuals within them.

The second dimension of justice within the family concerns the participation of family members in what is conventionally described as civil society. In assessing the justice of conventional family structures it is proper to ask how family membership and roles within the family influence the participation of individual family members in the structures of civil society. Again, from an egalitarian perspective, the critical question is whether the advantages and disadvantages are equitably shared or whether burdens accrue disproportionately to certain roles while benefits accrue disproportionately to others. Important questions concern the effect that such relationships have upon employment opportunities and the economic and social rewards associated with these. Equally, many of the roles of civil society offer their occupants substantial opportunities to exercise leadership capability and to experience the personal growth which is conventionally argued to accompany the exercise of influence, power, and authority. It is proper to ask whether family roles enhance or constrain individual opportunities to achieve these benefits, and whether, or if, compensatory benefits are available. If such opportunities are, as is often suggested by contemporary egalitarian theorists, important to individual development and self-respect, access to them is an important aspect of substantive justice, and it becomes essential to develop an account of just family structures as the foundation for any account of the just society. It may, of course, be that opportunities available within the family are equally important to individual development. This, as well, raises distributive issues, and these too cannot be resolved unless and until justice within the family becomes as important to political theory as justice within civil society.

The final dimension of justice within the contemporary family concerns the legal consequences of family membership. Today, the equality of citizens before the law forms a fundamental tenet of liberal democracies. The earlier ascription of political status by gender role has been eradicated. Equally, despite the formal presumption of equality, it is clear that family status and membership presently alters legal rights and obligations in ways which seem incompatible with liberal egalitarian theory. The rules and principles applied to intra-familial violence and coercion continue to differ significantly from those applied to violence and coercion among relative strangers. While such differences may, in theory, simply recognize that family members are not relative strangers and that the mutual bonds and obligations extend well beyond those appropriate among relative strangers, they may also conceal something very different. Given increasing evidence of the violence within families, and the fact that women and children are to a disproportionate extent the victims of such violence, and given that intra-familial violence is significantly less likely to be severely sanctioned both by the law and by the community itself than violence among strangers, and indeed, in some cases is still not subject to any legal sanction, it is clear that family membership significantly diminishes certain fundamental legal rights, including the right to be secured against violence from others where those others are members of the same family. Acknowledgement of the problem of 'private violence' is now commonplace in the popular media. *Time* magazine³ noted that while statistics on private violence vary wildly, and the exact extent is probably impossible to ascertain, 'it is beyond dispute, however, that extraordinary numbers of women and children are being brutalized by those closest to them.' In *Sisterhood is Global* it was suggested that in the United States

*approximately 2 million to 6 million women each year are beaten by the men they live with or are married to; 50-70% of wives experience battery during their marriages; 2000-4000 women are beaten to death by husbands each year; in 1979 40% of all women who were killed were murdered by their partners; 25% of women's suicide attempts follow a history of battery; wife battery injures more U.S. women than auto accidents, rape or muggings; every 18 seconds a woman is beaten by her husband severely enough to require hospitalization. Police spend 1/3 to 1/2 of their time responding to domestic violence calls; 97% of spouse abuse is directed against wives. Battery is a cross-class, cross-race problem.*⁴

Where the state provides economic benefits to individuals, legal marriage alters individual entitlement to benefits in ways which differ markedly from the norms applied to *de facto* relationships, homosexual relationships, and alternative forms of shared living

³ 5th Sept. 1983, 19.

⁴ See R. Morgan, (Ed.) *Sisterhood is Global*, Harmondsworth, Penguin, (1984), 704.

arrangements. The structure of these benefits incorporates many traditional presumptions concerning the appropriate incidents of family relationships - one of these being the presumption that altruism is the norm and economic dependence appropriate.⁵ Similar presumptions play an important role in the laws which govern individual obligations to the state, such as taxation obligations. Likewise, because the state establishes the norms and legal conditions governing marriage and divorce, it determines the sorts of relationship which can be legally recognized, the rights and obligations adhering to the married state, and the principles governing the termination of such relationships. The impact of rules such as these cannot be fully understood unless justice within the family is addressed on all three conceptual levels: with regard to internal family structure, with regard to the impact of family status upon participation in civil society, and with regard to the actual practical effect of the statist rules and norms which are applied to basic human relationships and their impact upon substantive equality.

Conceptually, I believe non-utilitarian egalitarian liberalism has its roots in the social contract theory of Rousseau. Alone among early social contract theorists he recognized that political equality could not be sustained in the absence of substantive economic equality.⁶ Without economic equality, relationships of dependence would inevitably arise between citizens, and once such relationships became established, citizens would act from their need to secure the good opinion of others rather than from their own judgment. For Rousseau, this was sufficient to undermine the moral devotion to the common welfare which was essential to a just social order. While contemporary egalitarian theories differ significantly from that of Rousseau, and will be examined in some detail later, their emphasis upon the connection between economic justice and political justice forms a unifying theme. For contemporary egalitarians, as for Rousseau, substantive economic and social equality form cornerstones of the just republic. Without them, the liberty and personal independence liberalism set out to exalt remain illusory.

Contemporary egalitarian liberalism is based upon a series of core propositions. The individual is treated as the fundamental unit of political society. Individuals are presumed to

⁵ For example, *de facto* relationships are treated very differently from legal marriage in determining eligibility for AUSTUDY benefits. The income of a *de facto* spouse is disregarded for a period of two years after the inception of the relationship for the purpose of determining whether the applicant meets the income criteria for eligibility. The spouse's income becomes relevant immediately upon legal marriage. While this applies in a gender neutral way, it does reflect and reinforce the traditional presumption that economic dependence is appropriate within marriage. Affected individuals of either gender presently living within a *de facto* relationship would be well advised to postpone legal marriage, if it is contemplated, until expiry of the two year period, a curious outcome. Marriages are automatically presumed to be stable and lasting, *de facto relationships* must be shown to have enduring qualities.

⁶ J.J. Rousseau, *The Social Contract and Discourses*, translated with an introduction by G.D.H. Cole, London, J.M. Dent & Sons, 1913. See specifically 'The Social Contract', 58-59 and see also 'A Discourse on Political Economy', 267.

share certain fundamental characteristics in common, and this commonality makes it possible to devise an account of justice which is equally applicable to all individuals. Rawls describes citizens as free and equal moral persons, and each element in this description emphasizes one of these foundational presumptions. Citizens are free because they are able to form, pursue and revise a set of final ends or goals. They are equal because they all have the capacity to cooperate and engage in social life. They are moral because they have the capacity to act justly and to respect others.⁷ While other contemporary egalitarians offer accounts which vary in detail, the characteristics of freedom, equality and moral capacity form themes which are common to their accounts.⁸ Liberal egalitarians argue that it follows from their description of the individual that the state ought not constrain the choices individuals make in the pursuit of their own plans and ambitions unless their choices are such as to be destructive of the equal right of others to do likewise. The choices individuals make in their private lives - choices such as religious beliefs, life-style and forms of relationship, conceptions of those things which make life worth living, and forms of individual expression and self-realization - reflect individual preferences and it is through these choices that social value is created. While, on an individual, or private, level, these ideally represent enduring commitments and are fundamental to identity, on the political, or public, level they are incommensurable and cannot be ranked for worth. They are choices the individual must make for himself or herself, choices which are made to further his or her interests as he or she perceives and defines them, choices whose worth only the individual can judge. Crucially, the liberal conception of the individual as freely choosing subject is formally presented as a non-gendered abstraction which is equally appropriate and applicable to men and women, and it is this presumption of universality which I shall challenge. I shall argue subsequently that just as our conventional language has traditionally assumed that the male represents the norm and the female a deviation from that norm, so too our inherited theoretical structures reflect the experiences and self-perception of men who perceive humanity and human needs in profoundly gendered ways.⁹

7 These ideas have recently been refined and elaborated in J. Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs*, Summer 1985, 223, 227.

8 See the theorists cited in n. 1. In what follows I shall primarily consider the work of Dworkin and Rawls, drawing upon points made by other scholars where and when relevant.

9 This last point has not been recognized by contemporary liberal thinkers, although there are a few notable exceptions. One such exception is James Boyd White. See J.B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, Wisc., Univ. of Wisconsin Press, 1985, where he notes at p. xv. 'The reader will see that I repeatedly and all too inelegantly struggle with the fact that traditional English speaks as the male were the norm, the female the exception. I know of no way to resist this insistence that is not itself awkward, but I hope that the reader's understandable irritation with my attempted resolutions will be seen to reveal not merely my own deficiencies of art but also this fact of our common language and culture.' Others have not yet dealt as directly with the impact of language upon our social structures. For example, in a recent article Dworkin simply comments that 'all singular pronouns are intended to represent both female and male, unless the context otherwise requires.' See Dworkin,

Because the justice of distributive outcomes within civil society and political society is impossible to assess without attention to the impact of basic human relationships upon opportunities and distributive outcomes a further question becomes unavoidable. It is necessary to ask whether full liberal social and economic equality for women can be secured without collapsing the boundary between private lives and public persons central to liberal political theory. Many of the existing inequalities within family structures are intimately linked with other religious and cultural norms and traditions which exert profound private influence. Often, such traditions presume that the husband and father exercises rightful authority over his wife and children and that he is both obligated to provide for their support and entitled to their obedience. Equally, participation in civil society is still frequently thought either inappropriate or unimportant for married women and women continue to find it comparatively difficult to attain full recognition in leadership roles in the political life of the community. Beliefs such as these form an important part of the individual beliefs concerning the substantive nature of the good life that contemporary liberal political theory argues should remain sacrosanct. Yet, examined closely, many of these private beliefs conflict profoundly with the egalitarian ambitions underlying such theories, and, I shall argue, nowhere is this conflict more marked than with respect to the family and the structure of family life, areas conventionally sheltered by the presumption of family privacy. All such beliefs are, to use the language of Dworkin, paradigmatically external preferences, preferences concerning the appropriate role for women both within the family and in civil society.¹⁰ In theory, therefore, these are beliefs which the state must not respect, beliefs which violate the dignity and equality of the individual. Yet, absolutely critically, it is beliefs concerning the family and family roles which provide the foundation for the views of most individuals concerning a valuable life for themselves. Problems arise precisely because such beliefs are both fundamental components of the lives many people believe are appropriate and virtuous lives for themselves, and, inevitably, are inextricably linked to the choices and options open to others. Given this, it is essential to question whether family privacy and contemporary egalitarian liberalism can be reconciled. If they cannot, perhaps no aspect of life may truly be described as private. In this area, more than any other, even the conception of a personal preference appears nugatory. Any preference we may have concerning an appropriate life for ourselves necessarily implicates others, defines their roles with respect to us. Once we consider preferences more enduringly held than, let us say, a choice between a peanut butter sandwich and a ham sandwich, any preference which, when realized, alters the range of choices available to others becomes

'The Place of Liberty', *loc. cit.*, 1. To the best of my knowledge, this represents the first time he perceived such a statement of intention to be necessary.

¹⁰ For development of the distinction between personal and external preferences, see R. Dworkin, *Taking Rights Seriously*, 3rd Impression, London, Duckworth, 1981, 234-275. For an account of the inherent difficulty in the distinction between personal and external preferences and a critique of Dworkin's insistence that only personal preferences can form a legitimate basis for policy making, see R. West, 'Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision', 46 *Univ. of Pittsburgh L.R.* 673 (1985), 714.

impossible to categorize simply as a personal preference. In that sense, all our preferences are external, and, it would follow, preferences the state ought not respect.

In those egalitarian theories which accord equality the status of the primary value, the potential for conflict may be elided in two different ways. On the one hand, it may be argued that the principles appropriate to relationships between citizens have no application within the family.¹¹ On the other the conflict may be addressed by manipulating the concepts themselves and seemingly depriving equality of concrete content where family relationships are concerned, a curious outcome. Equal concern, interpreted as concern for the individual as concretely situated, may be manifested through paternalistic restrictions upon conduct which effectively deny equal treatment and which may be self-perpetuating, that is, effectively ensure that the individual thus restricted will continue to require paternalistic protection.¹²

I shall argue that this conflict remains largely unremarked with respect to the position of women because the liberal conception of the individual remains a gendered construct, one which represents an ideal theory abstraction of the male gender role conventional in capitalist industrial societies. The liberal individual, on an abstract level, may be described as a rational self-interested maximiser of his own interests, an individual who chooses and consents to courses of action in order to further his own preferences and maximize his subjectively perceived welfare. Through his preferences, and the choices dictated by these same preferences, this individual constructs value, creates a life which he may call good. He is, in an important way, an unencumbered subject, one who stands apart from his relationships and must be considered independently of them. In a sense he is the man of the Enlightenment, a man whose station in society and whose access to goods and services depends upon his own

11 J. Rawls, 'The Domain of the Political and Overlapping Consensus', 64 *N.Y.U.L.R.* (1989) 233, 242.

12 See R. Dworkin, *Law's Empire*, London, Fontana Paperbacks, 1986, 204-206. This approach is not, of course, restricted to women, and, indeed, is equally manifested in a variety of consumer protection measures. Thus disadvantaged consumers may be able to avoid contractual arrangements which exploit their inability to comprehend the implications of such arrangements. Equally, of course, the fact that such contracts may be avoided may make it more difficult for other similarly situated consumers to obtain credit, or, indeed, to secure the goods and services they require. Similarly, the restrictions upon the activities of women and girls commonplace in many families, restrictions upon their freedom of movement or upon the range of activities in which they may engage, restrictions which may well be thought essential to protect them and ensure their safety and well being, may also ensure that they lack the confidence which may come through independence and that they fail to develop their capabilities in many areas and thus are denied the opportunity to realize their full potential. One critical difference, of course, is that while consumer protection legislation seeks to restrain the capacity of the powerful to manipulate those less powerful than themselves, many measures thought necessary to protect women and girls restrain, not those who might take advantage of them, but the victims themselves. While the protections in both instances may be 'necessary' given prevailing social and economic structures, a project seemingly directed towards compensation for differences in order to moderate the inequity of social outcomes also has the capacity to further entrench and sustain the structures which necessitated compensatory measures.

energies and choices. He is independent, both in the sense of being unencumbered by hereditary status and traditional role, and in the sense of being, at every moment, able to revise his choices and values and construct himself anew. Critically, he is psychologically, physically and economically independent of others, wholly self-sufficient. The female gender role conventional in these same societies and during this same period, it should be noted, is very different. I shall call the inhabitant of this role the invisible woman. The invisible woman is perceived, not as rational, but intuitive. By convention, she sacrifices her own interests to those of others, typically her husband and children. Her station in society and her access to goods and services typically depend, not directly upon her own energies and choices, but upon her relationships to others. Whereas, for the liberal individual, concrete social status depends upon occupational role, for the invisible woman, status depends upon her relationships to others. Dependence is the norm, economic and social independence the exception. Thus, I shall argue, egalitarian liberal theory remains both logical and internally consistent so long as the male gender role characteristic of capitalist industrial society remains the unacknowledged norm. To the extent that the liberal conception of the individual is legally applied to women, and, to an increasing extent, to children, and to the extent that families have ceased to be legally regarded as the property of a male head of the household¹³, liberal egalitarianism must somehow reconcile the inequalitarian consequences of an assertion of family privacy with its own egalitarian ambitions or acknowledge theoretical collapse.

Once family relationships could no longer be simply regarded as proprietary, as they were in early social contract theory, it became essential to construct an account of family relationships which acknowledged that husband and wife alike were equally citizens and entitled to be treated as such irrespective of any other roles they might fill. Contract, of course, was one option. Given that contemporary egalitarians no longer regard contract as sacrosanct, indeed argue that no individual may abrogate those rights to which he or she is entitled simply as a citizen, and given the prevalence of the belief that family relationships are of a wholly different character from the relationships of civil society, that affect and altruism prevail, contract seemed unacceptable as a foundation for marriage.¹⁴ In contemporary legislative practice, marriages have effectively become simply affective relationships which subsist only so long as they further the preferences of the adult individuals involved.

13 This description has become commonplace in chronicles of the evolution of family law in England. Eg., H.A. Finlay, *Family Law in Australia*, 2nd ed., Sydney, Butterworths, 1979, 98-9, [410].

14 Dworkin, for example, denies that contract is pivotal in associative relationships, be they familial, between friends or political. Instead, he offers an account of associative relationships which emphasizes that the concrete obligations which arise in such relationships arise out of the social practice itself and are inherent in it. The precise obligations present, therefore, depend upon the concrete relationships involved and seem likely, in pluralist societies at least, to be almost infinitely variable, making a coherent and workable universal regime governing marriage and divorce almost impossible to attain. Generally see Dworkin, *Law's Empire*, *loc. cit.*, 202 ff.

If family relationships, at least with respect to adult individuals, are simply regarded as individual preferences, the tacit message conveyed by contemporary family law¹⁵, when these relationships are dissolved the individuals concerned must be thought to have maximized their subjective well-being through their decisions. That is, they have chosen to terminate their relationship because it no longer serves their interests. Yet here contemporary legal practice conflicts with both theory and social fact. Under a regime allowing divorce at will, the choice facilitated by the legal system need only represent the willed choice of one individual. The view of the other adult involved is irrelevant. The essence of such a regime is its characterization of spousal relationships as non-obligatory. It endeavours to ensure that failed marriages can be terminated with a minimum of both conflict and formalities. Yet where, as is not infrequently the case, decision making is unilateral, the freedom of one party to realize his or her preferences is the denial of that same freedom to the other. In human relationships preferences for an appropriate life for oneself inevitably implicate others, and that remains true whether the decision is to sever a relationship or to foster it.

Even more striking is the fact that, to a greater extent than with other relationships whose substance depends upon the existence of legal formalities, marital relationships are substantively defined by the legal regime governing marriage and divorce. While choice exists in respect of entry into marriage and choice of marriage partner, this choice is limited at the outset by the requirement at the parties be biologically male and female and by the prohibition upon polygamous marriages. Likewise, legal conventions determine the economic substance of the marital relationship as viewed by the law, imposing a common legally recognized structure upon very different forms of economic relationship, thus denying the substantive premise of contemporary family law and, indeed, contemporary egalitarian theory, that such relationships further the preferences of the individuals involved. While the details of these regimes differ in different jurisdictions, they are relatively uniformly applied within them. One effect of this uniformity is to isolate legal reality from practical reality. For example, a couple may agree among themselves to maintain entirely independent financial relationships, but this independence need not be recognized in the division of property if dissolution occurs. Likewise, while a husband or wife who participates in the labour market may choose to provide that spouse who provides child care and associated homemaking services with a wage, that 'wage' will not be recognized as such by the taxation authorities. In such circumstances, the relationship of husband and wife legally precludes considering an aspect of that relationship as one between employer and employee. Such recognition as is granted by the taxation department takes the form of a dependent spouse rebate, a rebate entitling the employed

¹⁵ Critical elements in contemporary family law in Australia and in many American jurisdictions include the concept of divorce at will and without the consent of the other party, the proclamation that fault is irrelevant both in establishing grounds for dissolution and in determining the allocation of property and the need for support, the policy decision to facilitate the dissolution of marriage and the resolution of property disputes in order to allow for the ratification of new unions.

spouse to reduced taxation in recognition of a relationship of dependence, but one which does not of itself entitle the spouse who works at home to an independent income in recognition of the value of his or her labours.¹⁶ It may therefore be said that much of the substantive law impacting upon family relationships implicitly denies the precise premise upon which contemporary regimes governing the dissolution of marriage depend, that the preferences of the individual are central.

Many of these difficulties have arisen as a consequence of the gradual transition from a proprietary view of family relationships to the contemporary legal view of marriage as a relationship among two equal individuals, a transition which has largely remained unaddressed by theory. Under the older regime the family was defined by reference to the male head of the household and the conception of privacy reinforced his legal authority over family members and family property. Under the present regime family privacy serves a very different function. It is invoked as the core of a demand that family relationships be sheltered from state intervention, that the structure of these relationships be determined by individual families in the way they find most appropriate. Family privacy seemingly symbolizes the essence of private freedoms, that one sphere within which individual decisions and choices remain unchallengeable. Because many of the concrete attitudes and preferences manifest within family relationships cannot be reconciled with the egalitarian premises of contemporary theory, these are preferences which a liberal state ought not respect. Family privacy, however, conceptually demands just that, the preservation of a realm which the state enters at its peril. It is the family, more than any other social institution, which sustains and nourishes gender based inequality. It is within the family that gender roles are learned and reinforced, just as it is the household division of labour which structures participation in the workforce and the political sphere. If family relationships remain private, and the state concerns itself with their justice only if pathological breakdown occurs, statist egalitarian programs will continue to leave the underlying causes of women's economic and social inequality untouched. In reality, women lack economic equality in marriage, frequently subordinating their career aspirations both to the demands of family life and to the career paths of their husband. Their culturally assigned responsibility for domestic labour frequently ensures that they will be disadvantaged in the marketplace, lack the opportunity to amass superannuation and increments based upon years of service, lack access to promotional opportunities based upon seniority. Theory, however, seemingly relegates these sources of disadvantage to individual choice, for example, characterizes them in terms of individual preferences concerning the optimum balance of

¹⁶ It should be noted that, under the *Family Law Act* 1975 s. 72 it was held in *Eliades and Eliades* (1981) F.L.C. 91-022 maintenance may be ordered paid to a dependent spouse in a subsisting marriage. To that extent, under contemporary family law in Australia (although not in England or the United States) a dependent spouse is entitled to be provided with resources by the independent spouse and is entitled to exercise control over the monies so provided. The independent spouse remains entitled to determine the appropriate quantum, indeed, in the case cited, the amount had been stipulated prior to the hearing.

work, leisure and consumption.¹⁷ Such characterization, however, seems hardly apt to describe the concrete choices and decisions faced by many women. Critical questions remain unasked. How ought, for example, an individual decision to work part time or refrain from working altogether because home obligations and employment demands cannot be reconciled be characterized? Does such a choice reflect a preference for leisure over work? Why is it women who find it necessary to make choices of this kind? Why do men seldom confront this sort of conflict? If women who are confronted by a conflict between family responsibilities and career opportunities are seen simply to have chosen to subordinate their career aspirations to other goals, to have chosen the disadvantages which attend such choices, and their labour within the home and in parenting remains devalued, they may be deemed to have chosen disadvantage. In the arguments which follow, I shall endeavour to demonstrate that the accounts of distributive justice provided by Rawls and Dworkin¹⁸ are inadequate to address the structural inequality of women because they depend upon the assumption that a coherent distinction can be drawn between the private pursuit of a life the individual finds satisfying for himself¹⁹ and the public pursuit of substantive equality. I shall argue that structural inequality can only be eradicated by structural change. To the extent that the existing division between private lives and political egalitarianism is sustained, egalitarian theories continue to assume that women whose actual lives and opportunities reflect the deep structure of a profoundly gendered culture can and ought simultaneously conform to the ideal subject of liberal theory. Assumptions such as these, it must be noted, place the onus for achieving equality squarely upon women. As a consequence, women can be and are being held responsible for their failure to realize full equality.

These and related issues will be explored through examination of the contemporary legislative and judicial treatment of family relationships, both legal and *de facto*. Present legal norms will be explored from two distinct perspectives. First, it is essential to consider the model of family relationships assumed by these legal norms and to consider whether the present legal model is consistent with substantive equality for women and with the overt normative content of egalitarian theory. Second, I shall explore the models of family life traditionally assumed by liberal theory, and alternative models which appear more consistent with the ethical requirement of substantive equality. So doing, I hope to answer a number of distinct questions. First, I wish to explore the extent to which existing legislation and its interpretation can be reconciled with proclaimed liberal ideals, including equality for women. Second, I wish to explore whether the apparent shift towards liberal ideals in family law has increased or decreased the substantive equality of family members. Third, I wish to consider

¹⁷ Dworkin, 'Equality of Resources', *loc. cit.*

¹⁸ Rawls, *A Theory of Justice*, *loc. cit.*; Dworkin, *Equality of Resources*, *loc. cit.*

¹⁹ R. Dworkin, 'Liberalism', in *A Matter of Principle*, Cambridge, Harvard Univ. Press, 1985, 181, 203.

what an authentic liberal egalitarian model of family relationships might look like. Finally, I wish to consider the adequacy and universality of the liberal concept of the individual as applied to family relationships, with particular attention to its historic and economic roots. Because it is impossible to move from an account of formal justice to an account of substantive justice without at least tacit reliance upon a comprehensive ontological account of human nature, the ontological claims of egalitarian accounts must be deconstructed if the implications of their substantive accounts are to be understood.

CHAPTER 2

THE FAMILY AND POLITICAL PHILOSOPHY

INTRODUCTION

Perhaps the most remarkable characteristic of contemporary liberal political philosophy is the disappearance of basic human relationships, particularly families, from the ambit of its concerns. In and of itself, this is remarkable. Classical theories, beginning with Greece, dealt explicitly with the role and place of the family and with the nature of appropriate relationships within both the family and the household. Aristotle, in *The Politics*, devoted much of Book I to the household and to household management. Likewise, Plato, in *The Republic*, considered household and family relationships at length, and indeed, at least so far as his ruling class was concerned, argued that spouses and children ought to be held in common.¹ Similarly, many early liberal political and legal philosophers found it appropriate to address family relationships, often in considerable detail. Rousseau considered family relationships at length, both in *Emile* and in *Discourse on the Origin and Basis of Inequality Among Men*.² While both Hobbes and Locke tended to gloss over family relationships somewhat more briefly, both considered the issue.³ It is instructive to compare the wealth of analytical material in both classical Greek and early liberal theories with the dearth in recent accounts. In his only direct references, Rawls notes that '*the principle of fair equality of opportunity can only be imperfectly carried out, at least so long as the institution of the family exists*', and alludes to a theoretical connection between the difference principle and the principle of fraternity, which he suggests relates to the ideal conception of the family, but does not consider the implication of the varied forms of family life for distributive justice in any detail.⁴ Similarly, Dworkin alludes to family relationships only rarely. He suggests that a patriarchal family may qualify as an egalitarian institution if the cultural narrative which supports it '*accepts the equality of sexes but in good faith thinks that equality of concern requires paternalistic protection*

1 See Aristotle, *The Politics*, translated by T.A. Sinclair, revised and re-presented by T.J. Saunders, Harmondsworth, Penguin, 1981, 51-102 and Plato, *The Republic*, translated by D. Lee, 2nd ed. (rev.), Harmondsworth, Penguin, 1974.

2 See *The Emile of Jean Jacques Rousseau*, Selections translated and edited by William Boyd, New York, Teachers College Press, 1956, 117-168 and *The Essential Rousseau*, translated by Lowell Bair, New York, Mentor, 1974, 146-201.

3 See T. Hobbes, *Leviathan*, edited by C.B. MacPherson, Harmondsworth, Penguin, 1968, 251-261 and John Locke: *Two Treatises of Government*, a critical edition with an introduction and apparatus criticus by Peter Laslett, New York, Mentor, revised edition, 1963, 345-374. See further generally the commentaries upon these and other theorists in S.M. Okin, *Women in Western Political Thought*, Princeton, N.J., Princeton Univ. Press, 1979 and J.B. Elshtain, (Ed.), *The Family in Political Thought*, Amherst, Mass., Univ. of Mass. Press, 1982.

4 Rawls, *A Theory of Justice*, loc. cit., 74, 105.

for women in all aspects of family life.⁵ When this relative inattention is coupled with the increasing intervention of the state in almost every aspect of such relationships, it becomes the more remarkable.⁶

The invisibility of the family represents a natural extension of political liberalism. While, privately, we live our lives as gendered subjects, and gender roles are among the cornerstones of social identity, the theoretical structure of modern egalitarian political philosophy postulates a non-gendered ideal subject. Issues concerning gender roles, like other issues concerning human sexuality, become private choices, choices which have little direct bearing upon justice. Once the overtly patriarchal structure of early liberalism was rejected as untenable, liberals were faced with a critical, if unacknowledged, choice. Either the justice of family relationships ought to be open to analysis and criticism in the same manner and using the same standards as the justice of the relationships between relative strangers, or such relationships must be deemed apolitical, outside the realm where justice is relevant. Taking the former road must ultimately eradicate the private freedoms liberalism set out to secure. Taking the latter has left liberal theories open to a very different challenge. Contemporary egalitarian theories must demonstrate that gender neutral accounts of distributive justice could, if implemented as social practices, secure substantive justice for ordinary men and women in the context of their lives as a whole.

TRADITIONAL POLITICAL PHILOSOPHY AND THE GENDERED SUBJECT

The basic demand upon political theory is the requirement that it establish and justify the bounds of politics and political action. It must define the scope of its own subject matter. Meeting this requirement is a prerequisite to the existence of anything which it is proper to term political theory. Political theory, as a discrete discipline, depends upon the existence of a tenable distinction between those matters which are properly political and those which lie substantially outside the domain of politics⁷, a distinction which forms a critical part of the

⁵ Dworkin, *Law's Empire*, *loc. cit.*, 204-206.

⁶ I refer here, not only to the obvious forms of regulation such as the *Marriage Act* 1961 and the *Family Law Act* 1975 and such further legislation as the *Adoption of Children Act* (Tasmania) 1968, together with its parallels in other jurisdictions, but to the myriad subtle forms of regulation inherent in the power of the state to regulate education, to regulate child labour, to regulate the conditions and provision of extra-familial child care, and so forth. Under appropriate circumstances, governmental agencies such as the *Department of Community Welfare*, together with numerous private welfare agencies intervene in families which have been deemed dysfunctional, while further indirect regulation of human relationships occurs through bodies of legislation as diverse as the *Income Tax Assessment Act* 1936, the *Social Security Act* 1947, the *Student Assistance Act* 1973. Indeed, the plethora of parliamentary regulation is increasingly supplemented by judicial legislation as *de facto* relationships possessing some of the attributes of legal marriage are increasingly assimilated to marriage, albeit inconsistently.

⁷ This is particularly critical for contemporary egalitarian theorists. Rawls and Dworkin both insist that their accounts are political and do not depend upon wider moral and

accounts of contemporary egalitarians. Rawls makes such a distinction when he emphasizes that his account of justice is '*restricted to the basic structure of society*' and emphasizes the necessity of distinguishing between our identity as citizens and our '*nonpublic identity*'.⁸ Similarly Dworkin emphasizes that '*the liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals*'.⁹ The distinction relied upon is that between public institutional decision making and private decisions and private choices. A division such as this suggests that individuals must partially or wholly segregate their public identities, their role as citizens, from their nonpublic identities, to borrow Rawls' phrase. As citizens our equality ought to be legally supported and guaranteed. As nonpublic individuals, we may act in ways which disturb equality but the extent to which this is permissible is constrained by the requirements of the basic structure. Rawls cites as examples the requirement that churches be constrained by

*the principle of equal liberty of conscience [and] the principle of toleration, [and the rights of parents] by what is necessary to maintain their children's physical well-being and to assure the adequate development of their intellectual and moral powers.*¹⁰

The distinction relied upon by contemporary egalitarians, one which is familiar and intuitively appealing, is not, however, the only distinction which can be made. It is possible to argue that all relationships may be defined as political in which any individual exercises or attempts to exercise authority over any other individual, whether the source of that authority is cultural, religious, economic or governmental, and the exercise of that authority is deemed legitimate. On this definition no justification exists for excluding family relationships from the subject matter of political theory. The exercise of authority within families is commonplace, and its exercise is differentiated not only by age but by gender. Just as the power exercised by governments requires legitimation in both the form and manner of its exercise, that exercised within families requires legitimation. If substantive equality is a worthy aspiration, until and unless private relationships are, as a matter of justice, subject to egalitarian constraints to at least the same extent as those relationships presently defined as 'political', public egalitarianism will rest upon a fragile and unstable foundation. Those relationships presently deemed private are, because of their intimate nature and the privacy accorded them by cultural conventions, more likely to be subject to overreaching and abuse of power than 'political' relationships.

philosophical considerations. See Dworkin, 'Liberalism', *loc. cit.*, 203, Dworkin, *Law's Empire*, *loc. cit.*, 295-301 and J. Rawls, 'Justice as Fairness: Political not Metaphysical', 14 *Phil. & Pub. Aff.* 223 (1985).

8 Rawls, 'Justice as Fairness', *loc. cit.*, 247, 241.

9 Dworkin, 'Liberalism', *loc. cit.*, 203.

10 Rawls, 'Justice as Fairness', *loc. cit.*, 245, n. 27.

The present conception of the political as somehow separate and unique, distinct from other aspects of human life and endeavour, is one derived from Greek philosophy. In ancient Greece, the fundamental division was between the *polis*, or political community of equals, and the worlds of the household, of economics and commerce, of the non-citizens (and indeed non-persons) who were essential to support it. Within the *polis* men who were also, and crucially, citizens debated the nature of the good life and sought to formulate public practices which would foster it. Politics was a branch of ethics and was distinct from the more mundane and limited concerns of the household and the market. While there were ethical standards appropriate to household and market relationships, they were appropriate to beings of limited rationality and, unlike those which governed the *polis*, non-egalitarian in character. Political decisions might, indeed must, regulate the activities of this non-political domain, but the function of such regulation was to ensure that the life of the citizen was supported and fostered. The relationships within the household and the marketplace were not political relationships. Their character was fundamentally non-political, defined by custom and tradition. Only through acting as a citizen could a man become truly human, realize his true nature as political man, the man of the city. Later, Christian philosophers separated the city of God and the cities of men. Only the city of God could be described as the proper end of mankind. While the cities of men might strive to emulate divine laws, at best, they were a poor imitation. Ordinary people ought to obey political authorities, to render unto Caesar, for their obedience marked their submission to the will of God who had determined their status and whose will dictated their earthly conditions. The earthly city was transitory and unimportant, simply a way station to the heavenly community. While contemporary society can return neither to the *polis* nor to the early Christian image of humility and submission to authority as dictated by God, these early Western accounts illuminate many of the same questions with which modern theorists struggle.

Certain issues are central. First, and most important among these, in discussing political theory, is the nature of citizenship, what it means to speak of men and women as citizens. The question is not only who are to be citizens, although this concept was critical earlier¹¹, but what it should mean to be a citizen, a man, or woman, of the city. Specifically, that question is a demand that society address the issue of what individual men and women are entitled to simply by virtue of being citizens, members of political society. It might seem that if people can resolve this question they will have resolved the core of the debate, but this is not the case now, if indeed it ever was. Indeed, this second question leads on to further puzzles. We need to know, not only what it means to be a citizen, but, more importantly, the way in which our identity as citizens can and should be integrated with other aspects of our lives. None of us are simply citizens. I am a citizen, and a woman, a wife, a mother, a scholar, a friend, a lover. I am not first one, then another, today a citizen, tomorrow a scholar, perhaps on alternate Mondays a friend or one who loves animals. Neither am I some abstract entity

11

Eg. Aristotle, *loc. cit.*, 167-172.

behind these various roles, as if a faceless I donned first one mask and then another. If we are to remain integrated as individual men and women we cannot isolate ourselves from the roles we fill. The manner in which we fill those roles constitutes our identity as human beings for ourselves and for others.

THE LIBERAL PARADIGM

The basic division made by the Greek model between the rationality of political debate and action and the sphere of necessity, one revived in modern times by Arendt¹², emphasizes the basic distinction between the life of the mind and of political action and the mundane sphere of biological existence. With the development of political liberalism the ruling paradigm apparently underwent a profound revision, although I shall argue that this alteration is ultimately cosmetic, one aimed at maintaining the existing paradigm rather than a serious attempt to reconstruct and reformulate the terms of the debate.

The real contribution of liberal theory was to change forever the balance between the rational world of public deliberations and the private domain of the household and the market. Whereas, in Greek culture, it was clear that it was the *polis* which was important and represented the pinnacle of true human achievement, and the household which occupied a subordinate and inferior role, early liberal theories sought to account for this division in a different way. Crucially, the dichotomy between public and private was never in question. What was sought was a new justification for this fundamental division and a new and different role for the public world of political society. Hobbes, for example, saw *Leviathan* as the means to the end of forestalling conflict and thus making possible private satisfaction.¹³ This at once comprehensively downgraded the moral status of the political realm and maintained the traditional division intact. Whereas, for the Greeks, the household and the market existed to enable man to take his rightful place as citizen, existed to enable him to realize his potential as a rational being, for Hobbes, *Leviathan* was called into existence to make the satisfactions of the household and the marketplace stable, possible, and orderly.¹⁴ Similarly, Locke saw political institutions as the means to the ultimate end of the protection of private property.¹⁵ The public domain existed in order to enable men to seek private satisfaction without fear of interference by other men.

12 H. Arendt, *The Human Condition*, Chicago, Univ. of Chicago Press, 1958.

13 Hobbes, *loc. cit.*, 188, 223, 264.

14 Hobbes' chilling description of life in the 'state of nature' expresses well the purpose for which men seek the protection of laws administered by a sovereign. *Ibid.*, 188.

15 See Locke, *loc. cit.*, 395 where he states: 'The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property.' [Emphasis in the original.]

Several extremely important shifts in perception are hidden by this seemingly simple alteration in the role of political society. Within the classical paradigm, human nature was seen as determinate. Man realized his species nature most fully as a citizen and because this could only be attained through his participation in the *polis*, action within the *polis* represented an ethical imperative. Early liberal thinkers such as Locke and Hobbes saw things very differently. The idea of a determinate human nature had been abandoned. The Greek emphasis upon the connection between conceptions of human nature and fixed and determinate status had been comprehensively rejected.¹⁶ Early liberal theorists formulated the role of the state and the nature of political theory in very different terms, emphasizing the problem of order. For them, the paramount question to be answered by political theory was why men would willingly abandon their natural liberty and consent to the restrictions upon liberty inherent in political society.¹⁷ Consent was perceived to be critical. All early liberals emphasized the natural equality of men and their lack of binding obligations to one another. Contract seemed the archetype of a consensual relationship among equals, and it followed that political relationships ought to be based upon contract. The life of the citizen was perceived, not as the most perfect realization of man's nature, but as a restriction upon his freedom of action, a restriction which would be intolerable unless the benefits realized through a system of law and government outweighed the restrictions upon individual freedom entailed.¹⁸ In place of an ontology which emphasized the perfection of one's human nature through specified forms of conduct, a new, vastly less determinate ontology emerged. In its rudimentary, Hobbesian form, individuals sought to maximize satisfaction and avoid pain, but the specific nature of both the satisfactions and the pains depended upon the preferences of the individual, were inherently private, not communal. Similarly, for Locke, the drive to amass property was central, the problem was securing property against others who were equally acquisitive.¹⁹ Given the linked presuppositions of natural liberty and the drive to maximize well being and avoid pain, and the presumption of scarcity which ensured competition for goods and resources, the problem of order emerged. Without laws, without political institutions capable of resolving disputes and protecting property, life was inherently uncertain, perhaps even dangerous. Rational individuals dedicated to maximizing their own satisfaction would,

16 Women were, of course, an exception in this regard.

17 Hobbes, *loc. cit.*, 188, Locke, *ibid.* Kant emphasized the necessity for coercion to ensure the sanctity of contract and the protection of property. I. Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated by W. Hastie, B.D., Clifton, N.J., Augustus M. Kelley, reprinted 1974, 121-122. For all these thinkers, contract and property depended upon the coercive power of the state for security. Rousseau adopted a subtly different perspective. While he also acknowledged the role of the state in the generation and protection of property interests, the primary benefit of civil society was moral freedom. Rousseau, *The Essential Rousseau, loc. cit.*, 20-21.

18 Locke, *ibid.*, 395; Hobbes, *ibid.*, 223.

19 Hobbes, *ibid.*, 118-130; Locke, *ibid.*, 374-75, 395.

therefore, consent to restrictions upon their liberty in exchange for the protection of their persons and property by the state. Political society was no longer an end in itself, an institution essential if man was to realize his human nature fully, but a means of protecting his property and his person against the depredations of others and of ensuring that he could further his private interests through contractual arrangements enforced by the state.²⁰

When Rousseau and Kant sought to restore the ethical dimension of the political realm, sought to reinstate man as the *zoon politikon*, man of the *polis*, they confronted a major barrier. Once perspective had been altered, and the city existed to protect and secure the world of the household and the market, the moral impetus behind citizenship had to be rediscovered and reconstituted. In many ways, their solution was fundamentally Greek in character, but with one critical difference. Both Rousseau and Kant idealized citizenship, idealized public decision making and debate, the relationship between privileged and wholly independent men as citizens, but, simultaneously, having idealized rational deliberations, they left these deliberations suspended, fundamentally without purpose. While Rousseau celebrated the 'general will' and proclaimed it indestructible and devoted exclusively to the common security and well-being, and longed for the simplicity of a state in which the common good was apparent to all, its nature remained virtually unexpressed. Perhaps all that can be said with any degree of certainty is that the common good demanded the establishment of those conditions essential to ensure that man depended only upon the state or upon himself and never upon the vagaries of other men. The greatest benefit bestowed upon the individual by civil society was moral freedom, the capacity to be ruled by self-given law.²¹

Kant, far less republican, believed that a just society was one constituted in accord with underlying principles of right, but subordinated this to the further principle that

*it is the duty of the People to bear any abuse of the Supreme Power, even then though it should be considered to be unbearable. And the reason is, that any Resistance of the highest Legislative Authority can never but be contrary to the Law.*²²

Unlike Rousseau, Kant did not distinguish between a 'general will' and the aggregate force of the particular wills of individuals.²³ Williams comments:

²⁰ See the passages cited in n. 14-19, inclusive.

²¹ See Rousseau, *The Essential Rousseau*, *loc. cit.* At p. 85 Rousseau emphasizes the indestructibility of the general will, while at pp. 20-21 he makes the critical connection between moral freedom and civil society.

²² Kant, *loc. cit.*, 177.

²³ This view is supported, although not fully established by the references to 'Public Opinion' and the 'Opinion of the People', *ibid.*, 184-5. Likewise, Kant emphasizes that men's duties towards one another are not in any way altered by the transition from the natural state to the civil state. The civil union simply coordinated the activities of equals. *Ibid.*, 156-7. Kant described 'right' as comprehending 'the whole of the

The State is no more important than the freedom and law it provides within civil society, it does not represent a universal interest which can be ruled to be of greater significance than the individual's lawful pursuit of his own interest. . . . Kant takes, for the most part, a non-interventionist view of the State. He sees it as its role to preserve a common interest which is no more than an aggregate of the individual interests of the members of society. The general will which the sovereign represents is one which respects and, indeed, helps foster the competing private claims of individuals.

Williams' interpretation highlights one aspect of the contemporary liberal predicament. Once a determinate conception of human nature was abandoned, and the protection of man's liberty to pursue his own private interests became, effectively, the central purpose for which men established governments, it becomes very difficult to provide a positive criteria for the substantive content of the laws enacted. Their form, clearly, can be regulated using criteria such as equality and publicity, however this suggests merely how laws ought to be framed and promulgated, not the substantive issue of what laws ought to be framed and promulgated. Kant, if Williams is correct, falls back upon an almost utilitarian conception, suggesting that the state ought where possible enact laws which will maximize the capacity of individuals to pursue private purposes. The specific content of the laws was dictated by that required to protect proprietary interests including contractual rights. Kant emphasized that the duties among men did not alter with the transition from the 'non-juridical' to the 'juridical' state. Rather, in the 'juridical' state, such duties could be enforced.²⁴ The critical benefit of the civil union was the introduction of law, a power outside of the individual which possessed the capacity to authoritatively determine his entitlements. The satisfactions of the household and the market were clearly subordinate²⁵, representing a major departure from the earlier accounts of Hobbes and Locke, but the deliberations of citizens no longer focused upon the perfection of man's human nature as the man of the city. Rather, Kant idealized liberty. For Kant,

*RIGHT . . . comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person,*²⁶

and it was to secure and enforce this harmony that the state was constituted. That state was ideally constituted which most nearly maximized individual liberty. Only through liberty might

conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person, according to a universal Law of Freedom.' Ibid., 45.

²⁴ H.L. Williams, *Kant's Political Philosophy*, Oxford, Basil Blackwell, 1983, 164. The passages cited in n. 24 suggest that William's interpretation is correct in its fundamentals.

²⁵ Kant, *loc. cit.*, 173 where Kant notes that the welfare of the state ought not be confused with the well-being or happiness of the citizens.

²⁶ Kant, *loc. cit.*, 45.

men become moral, learn to act from duty alone. The concrete nature of individual actions and the motives which activated them were irrelevant. Rather, so long as those actions were both self-determined and could co-exist without interference with the actions of every other, the individual is wronged if hindered in their performance. Man was both fundamentally and deeply the *polis* animal, morally realized and complete only as a citizen, and as citizen without any uniquely public purpose.

Rousseau differed profoundly in this regard. The supreme test of the well-being of the state was the willingness of its citizens to set aside their private interests and cares and join together to deliberate the form and content of the laws.²⁷ Private interests and commercial pursuits distracted individuals from their obligations as citizens. To the extent that these came to predominate, individual freedom was irrevocably compromised because the pursuit of private interests and purposes inevitably brought men into conflict with one another and allowed relationships of dependence to arise, compromising the freedom of the individual and his capacity to participate in the moral aspect of the state. Likewise, to the extent that private advantage predominated public deliberations were corrupted and the expression of the general will frustrated because men voted their private individual interests and allowed these to take precedence over the well being of the state. Yet Rousseau seems profoundly ambivalent as regards the nature of the common good. On the one hand, he identified the common good with freedom and equality²⁸ while on the other he emphasized specific and substantive purposes dependent upon the particular character of the nation.²⁹ Yet the substantive purposes mentioned, religion, trade, virtue, seem particularized, and as such, divisive. At the point at which specific substantive purposes become determinative of the common good, the totalitarian state becomes a reality, and freedom and equality rhetorical flourishes.³⁰ Inevitably such purposes must be imposed upon those who do not acknowledge them, denying them the freedom and equality promised and compelling them to serve the will of others.³¹

Another element entered as well, one which reflected both the disappearance of the ideal of man as striving to realize himself as a species being and the wholly Greek vision of citizens as truly and fundamentally equal. Here, Rousseau, profoundly egalitarian, and Kant, less so, differed. Rousseau, foreshadowing the demand for equality implicit in the French

27 Rousseau, *The Essential Rousseau*, 78.

28 *Ibid.*, 45.

29 *Ibid.*, 46.

30 Cf. Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 182-183. Rawls comments at p. 182 that 'in a democratic society . . . the one good must be conceived as subjective, as the satisfaction of desire or preferences'.

31 This may, of course, be true of any push for substantive equality as well. Certainly, as I shall argue subsequently, substantive equality demands far greater political intervention than contemporary egalitarians acknowledge if it is truly to apply to all.

revolution, welcomed all men (but no women) as citizens, spoke of forcing them to be free, to engage in rational disputations, was prepared to subsume the marketplace to the demands of citizenship. In the world of Rousseau, the market was potentially of public concern.³² Indeed, he accepted the possibility of wholly radical redistributive taxation to enforce his neo-Grecian vision of citizens deliberating as equals. Kant, confronting the same problem, resolved it by banishing (as had the Greeks) those unfit for active citizenship to the nether world occupied by women and those who worked for wages. These dependent beings, beings whose economic and social dependence upon others disqualified them from participation in the deliberations of civil society, served both citizens and the state, but were not themselves fully citizens.³³ They were the *metics* and slaves of the Enlightenment. Again, this was hardly new. Those who depended upon others for their livelihood and well-being were perceived also to lack moral independence. They must consult the will and the interests of those whom they were bound to serve, rather than the interests of the state, and this plurality or confusion of interests disqualified them. Their social and economic condition deprived them of the capacity to act of their own free will, and this meant they could not participate in the ethical aspect of the state, the capacity to rule themselves through laws they had given themselves.

THE RISE OF THE BUREAUCRATIC SOCIAL WELFARE STATE

In these different approaches to a single problem, the nature of man as a citizen and the relationship between public and private established thereby, the same problems and divisions which plagued Greek theorists continued to dominate debate. Clearly, citizens do not exist as abstract beings suspended in ether, whether this is called the *polis* or the noumenal realm. Man may be the only rational animal however mind requires body to support its existence in the present and to ensure the possibility of a future. In political terms, given that people are more deeply biological and social beings (beings who depend upon food, upon shelter, upon relationships with others of their own kind) than rational and independent beings, the debate has been forced to confront the extent to which the needs of their hearts and bodies are properly the concern of the state.

Modern egalitarian theory and the parallel development of the bureaucratic social welfare state has forced political theory to confront the parameters of this debate in a far more

32 See, for example, in Rousseau, *The Social Contract*, *loc. cit.*, the remarks at p. 57 in which Rousseau emphasizes that a democracy cannot survive without a high degree of equality in rank and wealth together with little or no luxury. See generally also 'A Discourse on Political Economy', in Rousseau, *The Social Contract*, *loc. cit.*, 249-287.

33 Kant, *loc. cit.* Kant, at pp. 166-169, made a distinction between active and passive citizenship, and specifically denied apprentices, servants, women generally, and all those who work for wages and cannot offer the products of their labour for public sale full civil personality. While, as subjects of the laws they must be equal in the formal sense, they are denied any active role in lawmaking. The equality with which Kant is concerned reflects his profound philosophical dualism. As moral and rational beings, parties to the social contract, all people are equal, as empirical, sensuous beings this is clearly not the case. Cf. the discussion in Williams, *loc. cit.*, 60-61, 69-74, 137-149.

dramatic way than was necessary in the past. There are several reasons for this. The most significant of these is the view that government and political decision making are not activities which enable men to realize their humanity, but structures or frameworks within which private individuals may pursue their own destinies and realize their own ends.³⁴ For contemporary egalitarian, given that the state serves a facultative role, the central question has become the degree to which it is obliged to ensure that, so far as possible, individuals are equally placed to realize their own goals. Formal equality, clearly, is inadequate. Differences in ability, in access to resources, in education, leave some individuals disadvantaged. Whatever their goals may be, such individuals are handicapped in their efforts to realize them. Thus, if substantive equality has become the goal, political intervention is essential, and the manner and form of this intervention becomes central. Two decisions must be made. It is essential to decide, not merely which differences warrant compensation but how substantive equality ought best be attained. The questions which would arise if substantive equality for women became the critical issue and centre of debate illustrate the tensions inherent in any push for substantive equality. Individual women, clearly, are disadvantaged in many of the same ways as other disadvantaged individuals, lacking the capabilities, the resources, and the education needed to realize their goals. In addition, women are socially disadvantaged because conventional roles within the family handicap them in the pursuit of other ends. The first group of disadvantages is shared with other disadvantaged individuals and groups. The second is characteristic of the female gender role and is not shared. Disadvantages of the first sort might be categorized as 'morally arbitrary' or as a consequence of 'brute luck' rather than 'option luck'. The female gender role, particularly the role of wife and mother, is seldom thought to be morally arbitrary. To a substantial extent, women continue to be expected to assume such roles and to manifest the behaviours associated with them. Women's family roles are perceived both as morally obligatory and as fundamental to the survival of society. The conventional egalitarian answer is to regard the structure of gender roles, both male and female, as reflecting preferences, as simply a matter of choice, and as such, irrelevant to questions of distributive justice. Yet it is not clear that, to the extent that the work associated with these roles is both socially necessary and productive of profound disadvantage, such an approach is sustainable.

Among early social contract theorists Hobbes, Locke and Kant, but, significantly, not Rousseau, accepted the instrumental role of the state. For them the state existed to constrain and regulate private competition in a manner which was formally or procedurally fair to all its

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While this is particularly clear in the recent writings of Rawls, especially in J. Rawls, 'The Idea of an Overlapping Consensus', (1987) 7 *Oxford J. of Leg. Stud.* 1, echoes of this same theme abound in writers as diverse as Dworkin and Walzer. See Dworkin, *Law's Empire*, *loc. cit.*, 297-312 where he describes his preferred account of equality, equality of resources, as providing a method for mediating between competing preferences and values. Walzer attempts in *Spheres of Justice*, *loc. cit.*, to reconcile pluralism and substantive equality, arguing that different social goods require different patterns of distribution and that these are, at least in part, historically and culturally determined.

citizens. The security and stability ensured by the coercive force of the state, in turn, facilitated planning and made private reliance and trust possible. This ensured that individual citizens would be able to act so as to maximize their own perceived private interests. Great emphasis was placed by such thinkers upon the importance of the security of private contracts or agreements. Kant emphasized that the mere acceptance of a promise provided no security or guarantee. Something further was required, being *'the means of Compulsion that enable [the acceptor] to obtain what is his own.'* Williams comments that

*contract with Kant epitomizes the uncertainty and lack of trust which exists in the empirical relations of men in civil society. From an empirical point of view there are no compelling reasons for honouring a contract if it is not in our interests to do so. This is why contract requires the positive support of law if it is to work in civil society. . . . Where all else fails coercion must have the last word to ensure that contract is a reality.*³⁵

The role of the state was to secure and facilitate private transactions, enabling the individual to advance his interests as he perceived them.

Rousseau saw the matter differently, distinguishing the general will which the state ought strive to promote quite sharply from the aggregate force of the competing private wills of individuals. Whilst he believed that, even as individuals, our will was always for our own good, he also recognized that men being what they were they were often deceived about their own interests. If the common good were to be sought out of the shifting balance of private interests, it could never be attained. The outcome would inevitably be to give one faction dominion over others, and this would breed dependence and vice. For Rousseau, as for contemporary egalitarians, the state had a profoundly interventionist role, however his justification took a very different form. According to Rousseau, the interventionist role of the state was mandated by the need to sustain man's independence and autonomy. The truly independent individual, for Rousseau, was that individual who had no need to depend upon the opinions, resources or even the help of others to meet his needs. Inequalities of wealth and position inevitably destroyed independence - the poor being dependent upon the good will of those better off, and the wealthy being dependent upon the labours of the poor.³⁶

Contemporary egalitarian thinkers seemingly desire to fuse the insight of Rousseau into the pernicious effects of economic and social inequality with an account of the role and nature of government which owes far more to Locke, Hobbes and Kant. For them, the force behind egalitarian demands arises, not from concepts such as independence and autonomy, but from fairness. People ought not be compelled to serve an institution which effectively denies them benefits it makes available for others. Through this demand for fairness the marketplace

³⁵ Kant, *loc. cit.*, 121-122. See Williams, *loc. cit.*, 113-114.

³⁶ For a detailed analysis of the nature and role of independence in Rousseau and of the reasons he concluded that inequality of wealth and position destroyed independence and made virtue impossible, see Ch. 8.

has become a matter of intense public concern, as consumer protection legislation seeks to mitigate inequality of bargaining power and concepts of unconscionability or unjust enrichment become critical in contract law. Yet underlying these shifts, the emphasis remains upon private pleasures, private consumption, private pastimes as the modality through which individuals construct the good life for themselves. Government exists to ensure, that, so far as is possible, citizens share equally in the capacity to attain a life they deem good, whatever, in substance, its content may be. The specifically contemporary image is one of equal citizens, the emphasis being upon their equality under the rule of law rather than upon their participation in political activity.³⁷ While participation is important and must be guaranteed in equal measure to all, its realization remains one choice, one goal, among many. Participation has become one more private decision.

The Greek ideal of equality in the public action which was the essence of citizenship has been expanded to include an increasing emphasis upon substantive equality in the individual capability to attain those things necessary if the individual is to construct a life which is meaningful for him. Contemporary egalitarians seek an earthly state in which citizens are equally empowered to pursue their private destinies even as they acknowledge that these private visions of the good life are incommensurable. Man realizes himself, not as citizen, but as private individual. Likewise, the heavenly city, so far as it may be attained, is to be found in our private lives on earth. Increasingly, the emphasis is upon access to social goods and resources, access to those things deemed necessary if we are to construct meaningful lives for ourselves. Thus Rawls offers the 'thin theory of the good', a list of the basic social goods essential if the individual is to define and realize a life which is good according to his own lights. He identifies them as follows:

- (i) The basic liberties (freedom of thought and liberty of conscience etc.) are the background institutions necessary for the development and exercise of the capacity to decide upon and revise, and rationally to pursue, a conception of the good. Similarly, these liberties allow for the development and exercise of the sense of right and justice under political and social conditions that are free.*
- (ii) Freedom of movement and free choice of occupation against a background of diverse opportunities are required for the pursuit of final ends as well as to give effect to a decision to revise and change them, if one so desires.*
- (iii) Powers and prerogatives of offices of responsibility are needed to give scope to various self-governing and social capacities of the self.*
- (iv) Income and wealth, understood broadly as they must be, are all-purpose means (having an exchange value) for achieving directly or indirectly a wide range of ends, whatever they happen to be.*
- (v) The social bases of self-respect are those aspects of basic institutions that are normally essential if citizens are to have a lively sense of their own worth as*

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These remarks ought not be taken to suggest that political participation is considered unimportant by contemporary theorists. Dworkin argues for a specific conception of democracy which emphasizes participatory or agency goals in 'Political Equality', *loc. cit.*, while Rawls emphasizes what he terms the fair value of the basic liberties in J. Rawls, 'The Basic Liberties and Their Priority' in S.M. McMurrin (Ed.), *The Tanner Lectures on Human Values*, Vol. III, Salt Lake City, Univ. of Utah Press, 1982, 1, 40-46.

*moral persons and to be able to realise their highest-order interests and advance their ends with self-confidence.*³⁸

Rawls suggests that any meaningful conception of justice must

allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short "conceptions of the good") affirmed by the citizens of democratic societies.

It is noteworthy that Rawls, like other contemporary thinkers, explicitly eschews even reliance upon traditional liberal foundational concepts such as independence or autonomy as too determinate. He seeks a liberalism appropriate for a socially and morally pluralistic society, a set of principles upon which agreement is possible.³⁹ The egalitarian goal is that of economic, political and social equality on earth, of relatively equal access to the goods and resources needed to enable individuals and groups to realize, to the greatest extent possible, their private visions and dreams. The pluralist democratic state mediates between these conflicting and incommensurable forms of life and ensures that the consensus holds.

Justice, called by Rawls the first among virtues⁴⁰, ideally provides a framework within which private men may realize themselves as equals, and, in the process of doing so, create a public good. Because such thinkers have abandoned the classic Greek and Christian view that man by virtue of his nature has certain proper ends, that the given for man is to strive to realize the perfection of his nature - whether this is thought of as the rational life of the citizen or as realization of the city of God - questions of the public good both assume paramount importance and become questions of ineradicable difficulty.

Both their importance and their difficulty are well recognized by contemporary theorists. Governments must both make decisions and put those decisions into practice, and because of their power, the character of their decisions shapes the social environment. Dworkin argues that there are two distinct categories of political decisions, those which are choice-sensitive and those which are choice-insensitive. Choice-sensitive issues are those in which the *justice* of the decision depends upon the character and distribution of preferences within the community. In choice-insensitive issues, he cites capital punishment and racial discrimination in employment as examples, the correct decision does not depend upon the distribution of preferences within the community. Of course, as he acknowledges, there

38 J. Rawls, 'Social Unity and Primary Goods' in A. Sen & B. Williams (Eds.) *Utilitarianism and Beyond*, Cambridge, Cambridge Univ. Press, 1982, 159, 165-166.

39 This conception is most fully developed *ibid.*, esp. 161-164. Cf. Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.*, 4.

40 Rawls, *A Theory of Justice*, *loc. cit.*, pp. 3-4.

inevitably will be deep disagreement over whether a given issue is choice-sensitive, however that 'second-order' question is itself choice-insensitive.⁴¹ Despite the changed terminology the same fundamental question remains. How ought, in justice, public decisions be made? What substantive goals ought to be established and how may we determine them?

Because modern thinkers give a greatly enhanced emphasis to human choice and human freedom, and the affirmation of communal ends has often been used to deny freedom and equality to any who dare to dissent, social goals often seem less a matter of positive direction than a shifting and ultimately formless compromise between competing perspectives and conflicting ambitions. More and more, interest group politics move to the forefront, as smaller, more internally cohesive groups advance specific goals and argue that these ought to be the goals of the body politic as a whole. Likewise, cohesive and discrete groups within the wider community often demand that they be exempted from some requirement otherwise imposed upon citizens as a whole or that they be granted privileges not available to the wider community. Rousseau not only recognized the theoretical problematic inherent in pluralism but recognized as well the way in which the conflicts engendered by it frustrated the capacity of the wider community to form and implement communal goals.⁴² Contemporary theorists attempt in various ways to reconcile the social fact of pluralism with their theoretical ambitions. Dworkin relies upon the language of rights to protect individuals and groups against the imposition of majoritarian preferences and prejudices. Rawls relies upon the notion of an overlapping consensus to mediate between competing factions, arguing that all such groups will, if they adopt the appropriate standpoint, recognize that they must grant those liberties to others they would desire for themselves. Indeed, Rawls comments that

*faced with the fact of pluralism, a liberal view removes from the political agenda the most divisive issues, pervasive uncertainty and serious contention about which must undermine the bases of social cooperation.*⁴³

Nozick, despairing of any reconciliation, fuses a nightwatchman state with diverse homogeneous micro-communities or utopias, while Walzer celebrates pluralism and envisions a community in which no social good is distributed in a way which enables one group to

⁴¹ Dworkin, 'Political Equality, *loc. cit.*, 24 ff. Cf. the distinction between personal preferences and external preferences discussed in Ch. 1 and the distinction between issues of policy and issues of principle which played a significant role in *Taking Rights Seriously*, *loc. cit.*, 22-28, 90-100. The core distinction appears to be between those issues which ought to be determined through the political process and those which may be affected by judicial review in a constitutional democracy.

⁴² Rousseau, *The Social Contract and Discourses*, *loc. cit.*, 25-26. Rousseau's analysis of the dangers created by factional divisions and private associations is prophetic. In the modern pluralist state, instances abound, ranging from the bombing of abortion clinics by Right to Life Groups in the United States, to the present spate of threats against the life of Salman Rushdie following the publication of *The Satanic Verses*.

⁴³ Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.*, 17.

exercise pervasive power over another. Other legal and political theorists as well have explored these concepts. In drawing a distinction between imperial community and *paideic* community, Robert Cover highlighted the central problematic in pluralism, the fact that our relationship to the imperial state is ultimately grounded in its coercive power, whilst we are bound to more intimate religious, ethnic, and local communities by deep emotional bonds. I shall argue subsequently that an important way (surely not the only way) that such conflicts are mediated and defused is through the private family, and, in particular, through its role in re-legitimizing the inequality of women.⁴⁴

Pluralism is, paradoxically, both central to contemporary egalitarian demands for liberty and equality, and in continual tension with those demands. Freedom of association, for example, is critical to liberal ideals, yet freedom of association carries within itself a right not to associate, to exclude. Thus, at various times and for various reasons, individuals have regularly been excluded on the basis of race, ethnicity or sex from participation in various public and private associations. Today, racial discrimination is legally barred in countries such as the United States, Britain and Australia, although very often the applicability of the laws depends upon whether the association possesses a public connection.⁴⁵ Likewise, freedom of religion has become axiomatic, although debate continues over whether particular groups qualify as religions. Other questions are less frequently asked, and no clear answers have yet emerged. Where religious organizations also act as employers, for example, are such organizations entitled to make reference to moral or gender based criteria in employment decisions? If so, other cohesive groups ought, for the same reason, be entitled to apply their own internal standards in employment. A trade union with, as has often been the case in the United States, a tradition of ensuring that the sons and nephews of members receive union cards and thus become eligible for certain employment opportunities, would be entitled to continue this practice, a practice which contributes to cohesiveness among the membership and forms part of the ethos of the group even as it diminishes opportunities for others. If such criteria are disallowed, it may be argued that the state is attempting to destroy the internal integrity of the group through the destruction of its values. Yet, fair equality of opportunity

44 For the role of rights in Dworkin's theory see *Taking Rights Seriously*, *loc. cit.*, 131-290. A recent major article by Rawls, 'The Idea of an Overlapping Consensus', *ibid.*, was devoted to exploring the ways in which pluralist communities might attain a cooperative and stable public life as equals. Nozick, rejecting equality altogether as a political ideal, devoted the final section of *Anarchy, State and Utopia* to affirming that the sole appropriate role for the state was to provide a framework in which particular private communities could explore divergent forms of social practice in intimate, face to face communities. See R. Nozick, *Anarchy, State and Utopia*, Oxford, Basil Blackwell, 1974, 297-334. The entirety of Walzer, *Spheres of Justice*, *loc. cit.*, is devoted to attempting to structure a workable theoretical account of pluralist equality. See R. Cover, 'Foreword: Nomos and Narrative' 97 *Harvard L.R.* 4 (1983), esp. 11-20.

45 This is most readily done where there is reliance in whole or in part upon public funds derived from taxation.

demands, at a minimum, that those equally placed with regard to the particular concrete aptitudes required by a particular position have equal access.

At the core of existing social beliefs and practices, even, perhaps, to a greater extent than the political ideals alluded to earlier in the last paragraph, is the institution of the family. In our traditions, the family epitomizes privacy and autonomy. Indeed, the privacy and autonomy of the family remain pre-eminent among our settled convictions. Despite or because of this, debate concerning family structures and roles, concerning political intervention in the family, and concerning the role of the state with respect to 'family values' is endemic. Here public agnosticism is impossible to sustain. We can, it seems, neither refrain from direct or indirect intervention, nor justify our choice. More than any other single issue, issues directly or indirectly concerned with the form and character of family relationships are intractable. Indeed, it may be suggested that issues concerning the family typify those Rawls argued ought to be removed from the political agenda as catastrophically divisive.⁴⁶ It is, however, precisely this aspect of pluralism which social and economic equality for women compels us to confront. The various cultural and religious traditions present within pluralist societies constitute, to a greater or lesser extent, discrete forms of life. Within such communities, forms of family structure, and the gender roles characteristic of them are often at the core of their value system, and these beliefs are largely determinative of the opportunities and choices available to family members.

Although different interpretations have been advanced by different modern theorists, most modern accounts focus upon the idea that the machinery of politics exists to enable individual persons to realize private satisfactions, to realize their own aims and their own ambitions as fully as is possible. These diverse accounts are united by the conception that the just society is that society which enables all those within it to realize a life which they may call good. In so far as the idea of a public good remains meaningful, its content has best been expressed by Rawls. Rawls characterizes a society which approaches the ideal of justice as '*a social union of social unions*', and argues that

*a democratic society well-ordered by the two principles of justice can be for each citizen a far more comprehensive good than the determinate good of individuals when left to their own devices or limited to smaller associations. Participation in this more comprehensive good can greatly enlarge and sustain each person's determinate good.*⁴⁷

He compares such a society to an orchestra, in which the talents of diverse musicians unite to create a whole to which no individual musician could aspire.

⁴⁶ Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.*, 17.

⁴⁷ Rawls, 'The Basic Liberties and Their Priority' *loc. cit.*, 34. For a more general discussion of the idea of a social union of social unions and the way in which participation in a society ordered in this way creates a comprehensive social good, see pp. 30-39.

Tolerance, respect for diversity, are the ideal theory hallmarks of liberal justice. A true public good, it is argued, emerges out of mutual cooperation and respect between those whose private values are conflicting and incommensurable. The ultimate civic virtues are tolerance and cooperation, indeed, Rawls notes that

*when these virtues . . . are widespread in society and sustain its political conception of justice, they constitute a very great public good, part of society's political capital.*⁴⁸

In many ways, although the motivation behind the account is wholly different, this simply reiterates the fundamental Greek distinction between the world of the *polis* and the private spheres of the household and of the marketplace. In their public lives, citizens set aside private differences, meet in a spirit of tolerance and cooperation to pursue the common welfare. As private individuals, they pursue divergent common ends, create life-styles and communities dedicated to the realization of these life-styles, pursue divergent determinate goods. The difference, of course, is that while, for the Greeks, the *polis* represented the end or perfection of human nature, for us, political institutions are simply created structures or artifacts which enable us to further private purposes. This reversal of emphasis raises a question which would have been unintelligible to Greek theorists. Given that political authorities exist to protect and foster the capability of individuals to realize private purposes, to what extent ought such authorities interfere with the private activities and relationships of individual men and women, and the way in which, as private individuals, their communities are structured? This makes it necessary to distinguish between activities which are somehow public in character, belong properly to the city, the domain of citizens, and activities which are private, simply a matter which can be left to individual preferences and choices, preferences which are, by definition, a matter of personal choice. Ought, for example, private communities respect the liberty and equality of their own members as must the state? Note that here the question is not the issue of tolerance and cooperation between such private communities. Rather, having assumed that the consensus holds, that divisive issues have been removed from the political agenda, to what extent can and ought private associations, including the family, be compelled to respect the liberty and equality of their members? This question is very different.

Arguendo, let us accept that publicly tolerance and cooperation prevail within a liberal pluralist democracy, that mutual public respect flourishes and individuals set aside their private differences. Even this strong counterfactual assumption provides no necessary and sufficient reason to assume that the same conditions obtain privately. There are several reasons for this. First, membership in such associations is among those ends (adult) individuals are axiomatically at liberty to revise. Individuals may, with what they perceive as good and sufficient reason, consent to private inegalitarian relationships, although, unless consent is

taken to be both necessary to the legitimacy of the relationship and sufficient for it, this does not answer the further question of whether they ought to do so. Second, not all private communities can meaningfully be described as voluntary. Pre-eminent among these are families and ethnic communities. Third, where such institutions cannot simply be described as voluntary, as an end one is at liberty to revise, respect for the actual or potential liberty and equality of individuals becomes critical.⁴⁹ It seems reasonable to suggest that, the more socially and emotionally costly and tenuous escape from a given relationship becomes, the more critical justice becomes within it. The principles which form the basis for the public account of justice are necessary, but not necessarily sufficient. Rawls comes closest to addressing this issue, although he draws back from exploring its full implications and simply suggests that the good of social union can be realized by all those whose determinate conceptions of the good are compatible with the two principles of justice. He does not, therefore, address other than tangentially the possibility that the structures and values which inform and reinforce many of the families, ethnic communities, and religious groups within the social union are not compatible with the full implications of the two principles of justice *if they must be applied within them and not merely among them*. Crucially, he does not at any time consider in detail the full significance of the distinction drawn above, that between the public relationships between the various groups in a pluralist liberal state, and the private relationships within such groups.

Classical liberal thinkers both recognized the potential for conflict and addressed it in various ways. It was most frequently resolved by a combination of two quite different ideas. The first of these, harking back to Greece, removed by *fiat* certain individuals from consideration as liberal citizens, notably women.⁵⁰ The second, and related idea, was that the interests liberal society was concerned to advance were those of citizens as such. While only Rousseau spelled out the structure of domestic society fully his arguments were intended to justify the sharp distinction between the rational society of men and the private and sentimental world of the family and domestic relationships. According to Rousseau, just as men attained moral freedom by submitting their judgment to the general will, to a vision of public society in which all decisions were realized through the general will, women attained their own moral and spiritual perfection through submitting their individual wills to the particular will of their husbands. Each household became, in this way, a miniature commonwealth, formed by the submission of the will of the wife to that of her husband, and

49 Precisely because of the intimacy of family relationships, it may be, although I do not argue the point fully here, that respect for the potential liberty and equality of family members is more critical and central than concern for their welfare. See Ch. 6.

50 Here, I want to emphasize that, whatever the latent or overt misogyny of theorists as diverse as Hobbes, Locke, Rousseau and Kant, their affirmation of the patriarchal family had the signal benefit of ensuring that a sphere of life remained essentially outside the reach of the law. Within the family, the writ of the King did not run, and this both protected the private freedoms of (male) citizens and ensured that issues of justice had no relevance to family relationships.

these micro-commonwealths together, through submission to the general will, became the state.⁵¹

WOMEN IN EARLY SOCIAL CONTRACT THEORY

At this point it is essential to foreshadow arguments which will be presented in detail in later chapters⁵² and to look at some of the reasons women might have been excluded from the social contract and the theoretical advantages obtained from this exclusion. Although many early social contract theories purported to be universal, to represent the agreement of all individuals to establish political institutions with those powers necessary and proper to the furtherance of such aims as the protection of property or the realization of truly rational activity as citizens, members in good standing of civil society, the rational agreement of which they spoke was an agreement explicitly of men. The limits agreed to were limits deemed necessary for the protection of private property, the maintenance of order, the enforcement of contracts. The only relationships which were properly the concern of the state were contractual relationships and these were to be enforced according to their terms. Family relationships were different. The family preceded civil society, stood outside even the idea of a social contract. Such relationships, even if they originated in contract as Locke thought, were not strictly rational relationships, but sensuous, emotional, affective relationships whose proper end was the procreation and nurturing of children. They were governed, not by reason, but by emotion. The problem was not how families or kinship groups came to exist, because this was established by the natural drive towards procreation, but how and why *political* society came to be. However the relationships within the family might be characterized, they were not political relationships, nor, even when believed to be entered by contract, were they part of civil society. They could be banished from political theory.⁵³ The critical transition, particularly for Hobbes, Locke and Kant, was that from kinship to civil society. Kinship and family structures might be taken as given.

The question which concerned political theory, then, was not how families emerged and were internally structured, but how families united to form the state. The interests of the family units of which private society was comprised were represented by the male head of each family. As Hobbes explicitly noted, a family could have but one head, and only the head of each family could properly represent it within the commonwealth. Like Rousseau, Hobbes

51 On Rousseau's ideal of domestic bliss, see generally, *Emile*, *loc. cit.*, 130-165. Rousseau complains, at p. 132, that Plato, having abolished the family did not know what to do with women so he set about making men of them. At p. 160 Rousseau emphasizes the connection between marriage and citizenship, for the man, stating: 'When you become the head of a family, you become a member of the state.'

52 See Chapters 7 & 8.

53 For a good account of the problems see, M.L. Shanley, 'Marriage Contract and Social Contract in Seventeenth-Century English Political Thought' in Elshtain (Ed.), *loc. cit.*, 80.

recognized that in any postulated 'state of nature', that is, prior to the development of the laws of civil society, paternity was uncertain. The argument critics such as Okin⁵⁴ have suggested is missing or elided, that is, Hobbes justification for the progression from equality of the sexes in the state of nature to inequality in civil society, the reason given being that '*for the most part Commonwealths have been erected by the Fathers, not the Mothers of families,*' is, in fact, not absent at all. Rather, it is implicit in his acceptance of the uncertainty, indeed, potential irrelevance, of fatherhood in the state of nature.⁵⁵ I believe the actual argument to be as follows. Recognizing the plight of the state of nature, no property, no dominion, no mine and thine distinct in Hobbes' well known litany, and recognizing as well his denial that male and female parents could ever equally exercise dominion over the child, no man being able to obey two masters, it was logical, first, that fathers rather than mothers should establish commonwealths since they had most to gain thereby, and second, that once civil society was in place, the family (as a part of the property over which man's dominion was protected) must be represented by its male head.⁵⁶ For the father, civil society was critical. Given the total absence of binding moral obligations in the state of nature, and given the moral psychology advanced by Hobbes, neither men nor women had any non-contractual reason to refrain from sexual encounters pleasing to them. For the man this was critical. Women were naturally certain that any children they bore were their own, and their certainty did not depend upon the actions of any other. Men, on the other hand, could only be certain of paternity if women remained faithful to them, refrained from sexual relationships outside marriage. Because Hobbes' moral theory left no conceptual space for obligations other than those which followed from contract, both marriage and paternity depended wholly upon contractual obligations. Further, any authority men might attempt to exercise over their children was legitimate only if the mother had, by contract, ceded her natural dominion to her husband. His dominion over his children, like his dominion over his wife, depended upon contract, and no contract was enforceable in the absence of law.⁵⁷ It followed that men needed the power of the law far more fundamentally than did women, and for that reason had far more to gain from the social contract. This reasoning was both logical and eminently sensible. It offered a firm contractual

54 Okin, *Women in Western Political Thought*, *loc. cit.*, 98.

55 For an argument that the 'marriage contract' of classic social contract theory was indistinguishable from a slave contract, see Ch. 7. The classic account *assumed* that men appropriated women prior to entry into the social contract and that this proprietary relationship could then be enforced by the state. The manner and form of the appropriation was irrelevant.

56 On the equality of the sexes in the state of nature, the need for dominion to be vested in one individual, and the statement that commonwealths tend to be established by the fathers of families, see Hobbes, *loc. cit.*, 253. On life in the 'state of nature', see p. 188. For a clear acknowledgement that, unless the situation is altered by contract, dominion is and remains in the mother, see p. 254, where the further point is made that the father's dominion over the child depends upon his having dominion over the mother.

57 *Ibid.*

foundation for family relationships, one which could be enforced by law and which ensured that men's dominion over their wives and children would be secure. Further, by excluding women from those whose individual and particular interests ought to be represented by political theory, it ensured the continued existence of a dimension of life which was wholly private and outside political control, a sphere where law and justice ideally had no role to play. Men governed the family as the sovereign governed the state. Within the family, the husband's will was law. Its privacy and autonomy were secure.

The family on the one hand represented natural pre-political society. Women and children remained outside the social contract even as the contract by which women accepted the dominion of their husbands and ceded to him their natural dominion over their children was enforced by the state. Given the virtual unanimity of such thinkers concerning the uncertainty and lack of trust which must prevail without positive law, and given their perception of the problem of order, the need for coercion to ensure that men honoured their agreements, the family presented a major problem if it were to be seen in political terms. The account of human nature shared to a substantial degree by Hobbes, Locke, Kant and Rousseau suggested that uncertainty and strife must prevail within the family as in civil society if husband and wife were each thought possessed of independent interests which they were equally entitled to pursue. A later liberal thinker, Bentham, in the course of a scathing attack upon the notion of natural rights, and in particular the Declaration of the Rights of Man, commented:

*So, again, in the case of husband and wife. Amongst the other abuses which the oracle was meant to put an end to, may, for aught I can pretend to say, have been the institution of marriage. For what is the subjection of a small and limited number of years in comparison of the subjection of a whole life? Yet without subjection and inequality no such institution can by any possibility take place; for of two contradictory wills both cannot take effect at the same time.*⁵⁸

Bentham is to be commended for his honesty both concerning the nature of marriage during his times and concerning the incompatibility of an egalitarian, trusting, non-hierarchical relationship with liberal beliefs concerning human (male?) nature. Given the intimate and ongoing nature of family life, the possibility that either husband or wife might invoke the coercive power of the state to resolve conflicts between them on an ongoing basis could not be reconciled with the deeply held belief that the family represented a haven from the competition and strife which threatened civil society.⁵⁹ Absolute authority in the husband and

⁵⁸ See J. Bentham, 'A Critical Examination of the Declaration of Rights', in J. Bowring (Ed.), *The Works of Jeremy Bentham*, New York, Russell & Russell, 1962, 498.

⁵⁹ Macfarlane emphasizes that in England at least as far back as the middle of the Seventeenth Century correspondence of the period emphasized that the '*central advantage of marriage was the mutual society and companionship, the identity of interests in an otherwise competitive and individualistic world*'. See A. Macfarlane, *Marriage and Love in England: Modes of Reproduction 1300-1840*, Oxford, Basil Blackwell, 1986, 157 and the references cited therein. Locke also emphasizes mutual

father seemed the answer. The power of the state regulated competition in civil society, ensured that contracts were honoured and breaches penalized. If the state regulated the conflicting interests of family members on an ongoing or routine basis, treated family relationships as wholly contractual, relationships within the family must ultimately be assimilated to other contractual relationships in civil society. Only if authority was firmly established at the outset of family life and exclusive decision making power irrevocably vested in one individual could the family be reconciled simultaneously with the Hobbesian account of human nature and the problem the state was established to resolve, the problem of order.

Early liberal theorists did not acknowledge the possibility of a binding and ongoing egalitarian relationship between two adult individuals in which decisions were made under conditions of full mutuality and in which neither individual was entitled to exercise authority over the other to resolve conflicts.⁶⁰ The quotation from Bentham cited earlier puts the point well. Thus the most important question with respect to the family concerned who ought to have dominion over the household, and was thus entitled both to define its interests and to represent those interests in civil society. The state regulated the intercourse between family groups, each represented by its head, but not the relationships within them. Not only did these relationships pre-exist politics, their nature was authoritatively determined by the head of the household. The state represented the political union of male heads of families, each concerned to protect his property (which in theory included his wife and children) against his fellows. Given that the aim of civil society was to ensure that men would not be subjected to domination by others, and the belief that the family pre-existed civil society and remained outside it, the total sequestration of women was both logical and inevitable. If, as early liberal theorists such as Locke, Hobbes and Rousseau apparently thought, *'the family was a private association that preceded civil society. . . [it followed that] the state had no right to intrude upon or into it.'*⁶¹ From the perspective of the male head of household the family was both a private association under his protection and subject to his rule and a form of property. His rights over the family were in this way guaranteed by the state and their proprietary character protected the family against political intervention. Certainly, Rousseau in 'A Discourse on the Origin of Inequality' makes it clear that the kinship represents the first natural community, and that, as kinship groups adopted settled habits, wider social groups formed. It was competition among these wider groups, and the inevitable conflict over property together with the development of

support and companionship and community, indeed, identity of interests. Locke, *loc. cit.*, 365. For a discussion of the role and function of the family in Rousseau, see Ch. 8.

⁶⁰ See Hobbes, *loc. cit.*, 253; Locke, *loc. cit.*, 364; Kant, *loc. cit.*, 112. For a full account of the stance taken by Rousseau, see Ch. 8.

⁶¹ Shanley, *loc. cit.*, 94.

envy which necessitated the emergence of civil society and, indeed, the social contract.⁶² Hobbes as well clearly regarded the family as a pre-existing social institution.⁶³

An interesting and parallel expansion did occur. Because the aim of political society was to enable citizens to realize their interests as fully as was compatible with the demands of collective life, and because the interests which might be recognized by political society were those of citizens, family members were deemed to be represented by the male head of the family, the citizen. Because of this identity of interests, because the interests of the male head incorporated the interests of his wife and children, the division between man's public identity as citizen and the private satisfactions and pursuits political authorities were thought to protect and make possible remained clear. In theory, each man represented the interests of the household of which he was the titular head. Relationships within the household were devoid of political content, and, for that reason, had no public existence and might be safely disregarded. Only two spheres remained, the public world of the state and the private world of the marketplace. The state existed to serve the marketplace, to enforce the terms of contractual arrangements and facilitate the alienation of property. Although the distinction between public and private served purposes very different from those thought proper in ancient Greece, the division was identical. Men, acting as citizens, contracted to establish those rules deemed proper and needful to protect and preserve the integrity of the family (where man satisfied the needs of his biological nature and ensured the continuation of his name) and to enforce the agreements of the marketplace where he satisfied his desire for independence and his urge towards competition and acquisitiveness.

While, in many ways, the protection of man's capacity to realize private satisfactions had replaced the earlier image of man as fully man of the city, as citizen (except in Rousseau) and the role of civil society had been transformed, the persistence of the tripartite division between the domestic sphere of reproduction and sentiment, the rational and commercial world of the marketplace, and the political world of the state demonstrates its critical importance. Particularly in the rationalist theories of Kant and Rousseau, public life was thought to call forth capabilities which were different in character from those which dominated in private activities. As citizens, in an echo of Greek thought, men set aside private interests and needs and served wholly public purposes. These private interests, including all human relationships, threatened the rational and objective character of public debates. A man who heeded his private interests had not given over his particular will fully to the general will, to his duty as a citizen. Indeed, Rousseau noted that the individual's private and self-interested will coexisted with his capacity to participate in the general will. The refusal of any individual to subordinate his private will to the general will justified the body politic in forcing him to be free. He noted further

⁶² Rousseau, *The Social Contract*, *loc. cit.*, 210-238.

⁶³ Hobbes, *loc. cit.*, 253-255.

there is often a great difference between the will of all and the general will. The latter looks only to the common interest, while the former looks to private interest and is only a sum of individual wills.

His concern that the general will be clearly expressed led him to the conclusion that no partial societies ought to be allowed within the state. Private interests ought to be regulated by agreement and by law to the extent necessary to ensure that each citizen should know what was properly his. The ultimate goal of political society was to leave private men free to make choices and satisfy their ambitions in ways which did not threaten the public structure which made this possible.⁶⁴ As citizens, men were, in theory, equal, rational participants in public deliberations. As private individuals, they were acknowledged to be competitive, acquisitive beings, each seeking to set himself above his fellows and secure the greatest possible portion of what he wanted. With the clear exception of Rousseau, early liberal thinkers assumed that the equality demanded was equality before the law. Williams suggests that Kant believed that both natural and economic inequalities were socially beneficial, fostering competition among individuals. For Kant, as for most other early liberals, competition was essential to progress, and inequality is a part of the price we pay for private ownership of property. Williams comments that, for Kant,

*the a priori principle of equality is not undermined by what happens in civil society. It may well be that the "welfare of the one depends very much on the will of the other (the poor depending on the rich), the one must obey the other (the child its parents or the wife her husband), the one serves (the labourer) while the other pays etc. Nevertheless, they are all equal as subjects before the law. . ."*⁶⁵

Reasoning such as that above established several basic divisions. The most fundamental was that between the state, the public world of reason and equality, and civil society, the world of commerce and of private affairs. With this distinction in place, a second distinction was inevitable. The marketplace was marked by competition and acquisitiveness. In the marketplace, men sought to set themselves above their fellows, to secure for themselves the goods and services they required. Here, goods were bought and sold, and, increasingly, produced. The household (in male-stream theory) was a place of harmony, a place where unity of interests prevailed. The marketplace produced goods and services to meet the demands of household groups. It was the source of social wealth. The household consumed the wealth produced by the marketplace. Effectively, despite the fact that the very existence of the marketplace depended upon the households which met the needs of entrepreneurs and workers alike, such attitudes and beliefs diminished further the status of the family. Not only

⁶⁴ The parameters of this sphere of private freedom might be drawn broadly or narrowly. Cf. the very different approaches of Kant and Rousseau discussed earlier in this chapter.

⁶⁵ Cf. Williams, *loc. cit.*, 137-144. See esp. pp. 139-40.

were the individuals within the family politically invisible, subsumed within its male head, the family itself had become economically unimportant and unproductive. Thus, a further division identified the marketplace as public, with respect to the family, and the family as wholly and irrevocably private. Production belonged to the marketplace, consumption to the household. Production engendered wealth, and was valued for its capacity to increase the store of goods available. The household, as a matter of ideal theory, serviced the physical and reproductive needs of legal persons but produced nothing of commercial value.⁶⁶

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See D. Gittens, *The Family in Question*, London, MacMillan Publishers Ltd., 1985, 49-50 for a discussion of the family ideology associated with the hegemony of social contract theory. A wife's utter lack of legal existence was emphasized by the fact that as late as 1873 a judicially separated or divorced wife seeking custody of or access to the children of the marriage was required by s. 1 of the *Custody of Infants Act* 1873 (36 Vict., cap. 12) to sue through her 'next friend', clearly assimilating her to infants and other legal incompetents. At p. 206 Gittens discusses the development of the cult of domesticity and the associated push towards consumerism and the appropriate feminine role. In particular, note the rise of ideal of the graceful and cultivated woman of 'leisure'. Gittens also notes the connection these developments and the elaboration of housework at 121-123. She notes the connection between the proliferation of household gadgets and the increase in the time occupied by domestic tasks as the ideal of the permanently immaculate home gained in strength. The more affluent the family, the greater the emphasis upon cleanliness. The critical development was the link between creating a beautiful, sparkling atmosphere to be 'consumed' within the home by the male breadwinner, and the corresponding disappearance of home production of goods for exchange. For a particularly clear account of the ways in which images of the feminine ideal were constructed during the Victorian era, see L. Nead, 'The Magdalen in Modern Times: The Mythology of the Fallen Woman in Pre-Raphaelite Painting' in R. Betterton (Ed.), *Looking On: Images of Femininity in the Visual Arts and Media*, London, Pandora, 1987, 73, esp. 75-82.

THE SHRINKING PRIVATE REALM

INTRODUCTION

In the first two chapters we examined some of the attempts to sustain and support the division between public and private. We came to recognize that while the justifications tendered by classic Greek theory and early social contract theory differed profoundly, the division they sought to defend and sustain was identical. A further similarity emerged as well, the fact that in both cases the division depended quite fundamentally upon the exclusion of certain individuals, notably women, from the public sphere. Now it is time to consider the social, political and economic changes which led to the development of contemporary egalitarian theories and look at some of the ways in which these contemporary theories attempt to sustain the traditional distinction between public and private while simultaneously guaranteeing a substantial measure of social and economic equality to all adult individuals, men and women alike.

As the egalitarian ambitions of liberal political theory extended beyond the formal demand for a government of laws and not men, for laws which (at least formally) fell upon all male citizens in the same way, and as the market came increasingly to be regulated and controlled, the old distinctions began to crumble. Labour laws, increasing control of those goods which might be placed on sale, and finally, of the terms of sale themselves, diminished the scope of private choices and decisions, while increasing political regulation and the rise of political bureaucracies made a mockery of the image of free market competition and private entrepreneurial freedom. If freedom remained the liberal creed, its home was no longer to be found in the marketplace. Equally, the ideal of the unity of interests within the family came under attack. With the acknowledgment that women might be recognized as citizens, be counted among those with the full formal capacity to act as public persons, irrespective of marital status, and the persistent demands of women that they be allowed to move into many areas of the marketplace which powerful interests had fought to maintain as an exclusively masculine preserve, several traditions were threatened. The first was the conception that the family represented a unity of interests, that it might be disregarded in theorizing. The second, a change which has not yet been acknowledged by modern theorists, is that relationships between men and women can no longer be relegated to the domain of private choice. These relationships are entered by fully public persons and have profound public consequences, consequences felt at all levels of society. So long as male citizens represented the interests of private family units (their interests being equated to those of the family) the state needed only to involve itself in human relationships where this was necessary to regulate competition among men. Laws concerning marriage and divorce met this need, protected, until quite

recently, the husband's interest in the chastity of his wife and in the legitimacy of his heirs.¹ Indeed, the contractual image of marriage and divorce, replete with property settlements and allocation of fault, emphasized the gender roles characteristic of the Victorian era.

Once, potentially, it was acknowledged that each family member might have interests of his or her own, and was entitled to assert these interests in the public domain, the privatisation of the family and of women became much more difficult to reconcile with basic liberal premises. Legally, women now have full contractual capacity, increasingly participate in the marketplace and public affairs. If women and children are acknowledged to have interests which are distinct from and rank equally with those of men, the legal basis of male dominion over women and children is also challenged. While this change is most evident in family law, it is also gaining recognition in tort and criminal law. If a social contract was the theoretical foundation of political society, women must now be acknowledged to be parties to that contract and their interests served by it to the same degree and in the same way as those defined from a masculine perspective. Specifically, if political authorities are constituted to protect men *and women* against domination by others, and if, as modern egalitarians argue, social and economic domination open the door to political domination, no rational basis exists for excluding any human relationships, including marriage, from the political domain. There is absolutely no reason to suppose that social and economic domination do not occur within marriage, and every reason to suppose that they form a substantial part of the traditional conception of the marital relationship. That conception is one in which the wife's public status is derivative, dependant upon that of her husband, and, equally, one in which her economic survival depends, in whole or in part, upon his labour and the resources he is able and willing to provide.² A woman who remains bound to her husband because leaving him means a life of penury for herself and her children, a scenario replayed in many Western nations, is as surely subject to domination by others as a worker compelled to accept whatever wage is offered to avoid starvation. Both may be said to have consented, but, egalitarians must acknowledge, in

¹ When a statute permitting divorce was, for the first time, enacted in England, for example, it specifically entitled the husband to petition for divorce upon the ground that his wife had committed adultery. Adultery alone was not a sufficient ground for a wife's petition. See *Divorce and Matrimonial Causes Act 1857* (20 & 21 Vict., cap. 85), s 27. Perhaps more significantly, because it clearly reveals the political nature and structure of the family, it is noted in Blackstone's *Commentaries* that the killing of a husband by a wife constituted the crime of *petit treason*, for which the prescribed punishment was to be drawn and burnt. See R. M. Kerr, LL.D., *The Commentaries on the Laws of England of Sir William Blackstone, Knt., Adapted to the Present State of the Law*, Vol.I-IV, Fourth Edition, London, John Murray, 1876, Vol. I, 203. The converse, of course, could amount to no more than murder. This offence was abrogated by 30 Geo. 3, cap. 48, ss. 1 & 3 effective 5th June, 1790.

² Debate is still current concerning such issues as the effect, if any, upon the class position of the household where the wife *as well as the husband* engages in waged labour. Likewise, substantial effort has recently been expended upon an attempt integrate domestic labour into existing class analyses. For a representative group of essays dealing with this topic see, R. Crompton & M. Mann, Eds., *Gender and Stratification*, Cambridge, Polity Press, 1986.

both cases the purported consent may be said to have been unjustly obtained. If liberal theory is to make good on its individualistic premises, it must find a way of reconciling its public individualism with the reality of fundamental human relationships and their social and economic consequences.

Women now compete in the marketplace in increasing numbers, demand equal pay and equal opportunities for advancement, demand the public provision of child care facilities and of maternity leave. Equally, with the increasing view of marriage and family life as a means to individual self-realization and satisfaction, as an institution to be valued for the satisfactions it provides and rejected when these satisfactions diminish or fail, the social welfare state is increasingly confronted by the impoverishment of women. Following the dissolution of marriage or the breakdown of a long term relationship women whose dependent status and lack of access to resources had previously been concealed by statistics focusing upon household income routinely become dependent upon social welfare for survival. This, in turn, has led to new recognition of the long term costs of dependence. Such changes reflect the changing economic function of the family. As women and children gradually ceased to be recognized as economic assets and became economic liabilities the family itself became increasingly marginal. No longer perceived as a fundamental productive unit to which all family members contributed their skills and energies, events within the family seemed of marginal importance compared with those in the marketplace and the state. As Rowland notes

the result of industrialization was an increased separation of home and work spheres; the development of dependence on wages for survival; a gradual entrapment of women within the home area; and a gradual devaluing of women's traditional skills. . . . Women had become the dependents of men in a new economic way and "this dependency had become embedded in the workings of the larger economy".³

As views of marriage gradually changed, so that marriage was no longer thought to be a cooperative economic relationship essential to the survival of all family members and more significantly perceived as an affective and supportive relationship between husband and wife, one which emphasized the home as a respite from the rigours of the workday world, the ideology of the affective family emerged. Its hallmarks include the belief that marriage is the culmination of a romantic relationship between husband and wife, the further belief that marriage ought to contribute to the full development and self-realization of both husband and wife, the relatively recent suggestion that marriage is an egalitarian relationship, the death of the family as the essential productive unit, and the view that individuals are entitled as of right

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R. Rowland, *A Transdisciplinary Perspective on Women's Identity*, Melbourne, Oxford Univ. Press, 1988, 101.

to depart from unsatisfactory marital relationships and form new, hopefully more pleasurable, relationships.⁴

The affective family is ideologically, psychologically and spatially isolated from other social institutions. Ideologically, the family is idealized as conflict-free, loving, supportive, altruistic, an institution based upon sharing, indeed, it epitomizes everything the market is not. In practice, of course, in at least one quarter of families this image bears little resemblance to the reality of family life. The dichotomy between ideology and reality is emphasized by American statistics which suggest that a *minimum* of 25-30% of wives are battered at least once during their marriages. Note also the soft nature of statistical information in this area. Many, possibly most, episodes of physical and emotional abuse are never reported to authorities, or, alternatively, do not come to the attention of authorities for many years. While anecdotal evidence may be available in some instances, victims frequently conceal the fact that they have been abused out of shame. Epidemiological studies in the United States emphasize that wife abuse occurs at all socio-economic levels and among all ethnic groups.⁵ It may be that the spatial isolation of the nuclear family contributes to these difficulties. Given the rise in geographic mobility, wider kinship networks are gradually diminishing in importance, contributing to what may be described as the closed nuclear family and forcing it inwards upon its own resources. Geographically, the family is distanced from workplaces and from wider social institutions providing services.

While some of the conceptual origins of the affective family are apparent in the work of J.S. Mill⁶, his ideal of egalitarian friendship bears little resemblance to the contemporary popular ideal of romantic love. Indeed, the popular conception seems much more 'liberal', with its emphasis upon the satisfaction of desires or preferences. Marriage is entered for the satisfactions it brings, and, it follows, ought to be abandoned when these satisfactions diminish

4 For a sociological discussion of the ideology of the family and the profound discrepancy between popular ideology and social reality see G. Allan, *Family Life: Domestic Roles and Social Organization*, Oxford, Basil Blackwell, 1985, especially Ch. 5, 87-99.

5 See M.D. Pagelow & P. Johnson, 'Abuse in the American Family: The Role of Religion', in A.L. Horton & J.A. Williamson, (Eds.), *Abuse and Religion: When Praying Isn't Enough*, Lexington, Lexington Books, 1988, 1, 2. For an account emphasizing the statistical difficulties see M. Straus, R. Gelles & S. Steinmetz, *Behind Closed Doors: Violence in the American Family*, Garden City, Anchor/Doubleday, 1980. See also L. Radford, 'Legalising Woman Abuse' in J. Hamner & M. Maynard (Eds.), *Women, Violence and Social Control*, Atlantic Highlands N.J., Humanities Press International, 1987, 135. All these accounts emphasize the cross-class nature of the problem.

6 The conception I have termed the 'affective family' has its conceptual roots in the writings of John Stuart Mill. See J.S. Mill, 'The Subjection of Women' in J.S. Mill & H. Taylor, *Essays on Sex Equality*, edited by A. Rossi, Chicago, Univ. of Chicago Press, 1970. While Mill did not foresee the form legal implementation has taken, he emphasized a bond constituted by mutual sentiment and one in which the relationship was substantively egalitarian.

or fail. Yet, given that the economic role of women has gradually been confined to the family, given that women continue to bear primary responsibility for nurturing children and for domestic labour, and given that even those women who work outside the home are likely either to be employed in traditionally female and economically marginal areas of the labour market or to have subordinated their career development to that of their husbands, the move to the transitory affective family seems likely to accelerate the trend towards female poverty. While, undeniably, many women are responding to this recognition by attempting to sustain labour market participation, the social infrastructure essential to facilitate this is not yet in place. Women are less likely to amass resources such as superannuation and other forms of employment related property within marriage, and, given their greater longevity, more likely to be impoverished in later life. Likewise, when marriages fail, women are more likely to suffer a severe diminution in economic resources, both because of interrupted labour market participation and because they are presumed to be capable of attaining economic self-sufficiency.⁷

This change in social attitudes is, in turn, attended by increasing demands that the state meet the needs of those who find themselves unable to survive on their own. As parties to the social contract, women increasingly demand that their particular voices be heard, that their needs be met, that, effectively, they receive what they bargained for, in Rawlsian terms their fair share of the benefits of cooperation. These changes, and the newly public individuals whose presence augured them, have led on one hand to demands for the re-emergence of the wholly unfettered marketplace and the denial that duties exist which are not fully contractual in character, and to demands on the other hand for the expansion of the bureaucratic social welfare state and the extension of full social, political, and economic equality to all who now rank as citizens. They necessitate a total re-examination of the division between public and private together with the rationale upon which this dichotomy was based. Any liberal theory which aspires to be both egalitarian and individualistic must address itself to a changed context. The distinction traditionally relied upon between public decisions and private freedoms must be given a new theoretical foundation or relinquished and a replacement found. The family and all it symbolizes can no longer be treated as private and autonomous as once it

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It has been suggested that two-and-a-half times as many women over 65 as men over 65 live in poverty in the United States, about 20% of all women over 65. See H. Scott, *Working Your Way to the Bottom: The Feminization of Poverty*, London, Pandora Press, 1984, 19. Likewise, statistics abound which illustrate that women are, to a far greater extent than men, economically disadvantaged by marital breakup. One of the more remarkable features of the feminization of poverty in recent years is the extent to which its victims are women of the middle class and above. For recent Australian statistics see P. McDonald (Ed.), *Settling Up: Property and Income Distribution on Divorce in Australia*, Sydney, Prentice Hall of Australia, 1986, 102-105. American discussion of the same points may be found in R.T. Eisler, *Dissolution: No-Fault Divorce, Marriage, and the Future of Women*, New York, McGraw Hill, 1977, 20-40. Generally see L.J. Weitzman, *The Divorce Revolution: Unexpected Social and Economic Consequences for Women and Children in America*, New York, The Free Press, 1985.

was, for the liberal rationale for both its privacy and its autonomy depended upon the denial of personhood to women and upon the concomitant view that the family was the property of the head of the household.

CONTEMPORARY LIBERAL POLITICAL THEORY: A FAILURE OF IMAGINATION?

The profound theoretical difficulties heralded by the social and political changes of recent times have not, as yet, been addressed in any comprehensive way by political theory. As the theories of Dworkin and Rawls demonstrate, these issues continue to be subordinated or disregarded while new variants on a traditional liberal framework are deployed and refined. Dworkin's account of equality of resources deals with the problems posed by human relationships by ignoring them, a difficult manoeuvre for an egalitarian. He argues that political institutions must devote an equal share of resources to each individual life, but does not move beyond this and consider how such a principle can be applied equitably in a world in which individuals have relationships of various sorts and are both separate individuals and members of various social units and in which their actual equality is at least as dependent upon their social roles as upon their individual choices in resource utilization.⁸ While it may seem that individual choices and social roles are inextricably linked, or in liberal terms, that social roles are a consequence of the pattern of individual choices over time, a critical question for egalitarian theory is masked by this 'natural linkage' and by the emphasis upon choice. Certain social roles, those constitutive of the female gender role in particular, are also linked to pervasive patterns of disadvantage. Within nation states such as Australia and the United States women are seriously disadvantaged in economic terms⁹, and this economic disadvantage arises both from the devaluation of traditional female occupational roles and from the cultural assignment of nurturing and homemaking roles to women. Put in liberal terms, women *choose* occupational roles which perpetuate disadvantage just as they *choose* marriage and childbearing. If these roles disadvantage them in economic terms, and, further, if their perceived commitment to family roles significantly contributes to their lack of political power, they have, in effect, *chosen to be disadvantaged*. Yeatman makes a similar argument in suggesting that

⁸ That he clearly recognizes the problem involved and its intrinsic relationship to the public/private boundary is shown in passages from Dworkin, *Law's Empire*, *loc. cit.*, 297-312. A particularly clear statement occurs at p. 300 where he argues that '*the division between public and private responsibility in property draws a crucial distinction between the responsibilities individual citizens have on two kinds of occasions: first, when they decide how to use what the public scheme of property has clearly assigned them and, second, when they must decide what it has assigned them.*'

⁹ Even those women who chose non-traditional occupational roles tend to remain comparatively disadvantaged. For example, recent surveys have shown that in Australia the average male lawyer earned \$73,885 while the average female lawyer earned \$48,757. See 'At \$74,000 lawyers nudge top rung', *The Mercury*, Thursday, Dec. 21, 1989, 5.

in the bracketing out of any specific dependencies of the individual and of the specific content of his individuality, the family is inevitably bracketed out of the civil conception of society. The family is consigned to the "private life" of these individuals, whereas "society" concerns their publicly manifest, abstract and nonspecifically disclosive individuality. The logic of this is to suggest that whatever specific dependencies the family may involve, they are structured or determined by the wills of these auto-determined individuals. . . .

She goes on to argue that this places the family outside the morality of civil society.¹⁰

Women's location within the family, and specifically, their biological sex and the gender roles perceived as compatible with it both by themselves and by others are, it seems, incompatible with full participation in civil society. In a very real sense, to the extent that women make choices which enhance the well-being of family members, and which, in the long term, significantly increase the risk of economic disadvantage either following dissolution of marriage or in old age, they behave in ways which are incompatible with the implications of the liberal model. West suggests that

the liberal claim that human beings consent to transactions in order to maximize their welfare may be false. If it is, then the liberal claim that social value is created through facilitating choice will be false as well. But furthermore, women may be "different" in precisely the way which would render the empirical assumptions regarding human motivation which underlie the liberal's commitment to the ethics of consent more false for women than for men. Thus, it may be that women generally don't consent to changes so as to increase our own pleasure or satisfy our own desires. It may be that women consent to changes so as to increase the pleasure or satisfy the desires of others. . . . For if women consent to changes so as to increase the happiness of others rather than to increase our own happiness, then the ethic of consent, applied even-handedly, may indeed increase the amount of happiness in the world, but women will not be the beneficiaries.¹¹ [Emphasis in original.]

In this section I have suggested that contemporary egalitarian theorists have failed to recognize the theoretical significance of the social and political changes of this century, and that, as a consequence, their accounts of distributive justice may be inadequate to address the inequality of women. Now it is time to begin to examine those accounts in some detail, and to evaluate the critical resources they make available.

EQUALITY OF RESOURCES: EQUALITY, EFFICIENCY AND THE MARKET

Dworkin's account of resource equality adopts as a theoretical ideal an atomistic and competitive world, one in which independent adult individuals who bargain at arm's length

¹⁰ See A. Yeatman, 'Despotism and Civil Society: The Limits of Patriarchal Citizenship' in J.H. Stiehm, (Ed.), *Women's Views of the Political World of Men*, Dobbs Ferry, Transnational Publishers, 1984, 151, 155-165. The quoted passage may be found at p. 157.

¹¹ R.L. West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', 3 *Wisc. Women's L.J.* 81, 92 (1987).

calculate the costs involved in their preferences and satisfy those same preferences in isolation. Of necessity, his account assumes that they make their decisions in resource choice and resource utilization to further their subjective well-being. While such individuals are compelled to consider the preferences of others in the course of the cost benefit analysis which, in ideal theory, guides their decisions, this is only because the relative scarcity of and demand for resources determines the price they will be required to pay. Equality of resources relies upon a classic state of nature image. Castaways upon a desert island agree to an equal division of the available resources and accomplish this by means of a Walrasian auction which determines the 'prices' at which all of the available resources clear the market given the preferences of the castaways for different resources. Dworkin argues that if individuals were, counterfactually, equal in their natural capacity to make use of the available resources, this mode of allocation would enable them to satisfy their preferences as fully as possible, given the preferences of others. Following the division, again assuming equal natural endowments, while individuals will come to differ greatly in 'bank account wealth' because of different choices regarding work, leisure and consumption, equality will be maintained because these differences are a consequence of choice. Some individuals will prefer to devote the bulk of their time to work, while others will prefer leisure. Likewise some will be content with baked beans on toast, while others will require fine wines and rare and special foods to maintain a minimal level of contentment. While individuals may come to envy the 'bank account wealth' of others, they do not envy the lives of those others taken as a whole.¹² The model used makes it clear that, presuming an initial equal division of resources in accord with the collective preferences of the group, the bench-mark for equality is whether or not individuals would envy one another's lives, taken as a whole. So long as they would not have chosen to lead those lives, preferred them for themselves, the mere fact that they might, at some point in time, prefer the monetary consequences of another's life does not signify inequality.

Following dissolution of marriage, for example, the fact that former husbands tend to be economically advantaged by their bundle of life choices, and former wives, particularly those who have either interrupted their labour market participation to bear and nurture children or have subordinated their career pathways to those of their former husbands, economically disadvantaged by their bundle of life choices, seems unlikely to constitute inequality within the framework provided by equality of resources. If we assume that the life style of the couple was fundamentally middle-class, that both partners at the outset of the relationship had comparable education and talent, then if the former wife chose to subordinate her labour market participation to her family responsibilities, she has simply preferred one set of rewards above another and has no cause for complaint even if he continues to enjoy a middle-class lifestyle and she requires redistributive payments to support herself and their children. Seemingly, the model proposed systematically rewards self-directed choices and

¹² See generally, Dworkin, 'Equality of Resources', *loc. cit.* The arguments summarized in the text may be found at pp. 284-290 and 304-308.

penalizes other-directed choices, at least where the content of the good life for the individual implicitly incorporates the freedom to opt out of existing relationships and seek other avenues for self-realization. Dworkin's ideal theory account of equality of resources apparently offers few conceptual tools which are fully adequate for the resolution of issues of this sort. Many questions which are central have yet to be asked. What, for example, has she in fact chosen? How do we characterize her choice? Has she preferred leisure above work, a characterization which appears plausible if 'work' is equated to income producing activity? Has she, perhaps, if we recognize child care and household labour as work, chosen to devote her time and efforts to activities which community preferences deem of little economic value? Does the fact that homemakers do not, in our culture, receive wages for child care and housework signal a market failure or a legal failure, or is it a consequence of deeply embedded cultural traditions which have shaped both the law and the marketplace? Is the real problem the increasing prevalence of divorce, or is the problem our cultural expectation of marriage itself?

Although, for Dworkin, human relationships are clearly not simply individual choices, and his account of associative obligations generally attempts to demonstrate that voluntariness and choice have but limited roles to play in human associations¹³, including political associations, his attempt to reconcile private permissiveness with public egalitarianism remains unsatisfying. Historically, inequality has been reinforced and enhanced by private decisions concerning resource acquisition and allocation, and nowhere is this more saliently illustrated than in the present feminization of poverty, a phenomena well advanced in the United States.¹⁴ While Dworkin models his account of political obligations upon the sorts of obligations which arise among family members, this seems more a device which is adopted for simplicity of exposition than a serious attempt to come to grips with the moral and social reality of human relationships and their economic consequences.¹⁵ His individualistic account of resource equality, an account which dominates his account of distributive justice and supports his account of common law adjudication¹⁶, emphasizes calculation, emphasizes the cost of preferences, emphasizes the role of choice in decision making. Little effort is made to reconcile the individualism mandated by his account of resource equality with the almost communitarian emphasis of his account of associative obligations generally. Rather, he introduces a reformulation of the public-private distinction and asserts that while governments have an obligation to treat their citizens as equals, this obligation does not always carry over as

13 Dworkin, *Law's Empire*, *loc. cit.*, 195-216.

14 See, generally, Scott, *loc. cit.*

15 Dworkin, *Law's Empire*, *loc. cit.*, 195-202.

16 *Ibid.*, 301-312.

a general duty of private life.¹⁷ As private individuals we are entitled to adopt a permissive self-interested attitude unless it is unclear what our precise entitlements are.

Despite the individualism of his account of resource equality, Dworkin also insists that

*the best defence of political legitimacy . . . is to be found, not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, where philosophers have hoped to find it, but in the fertile ground of fraternity, community, and their attendant obligations. Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation.*¹⁸

The question which must be asked is why he supposes that individuals such as those in his theoretical account of equality of resources could or would see themselves and their communities in this way. Whatever else one might wish to say concerning the castaways who figure in his ideal theory account of equality of resources, it is difficult to conceive of their forming a community. Rather, in a classic social contract image, they are isolated, pre-social individuals who seek to allocate the available resources in a way which will minimize present and future conflict among people devoid of existing social bonds. If these individuals form a community at all, it might best be termed an accidental community. Clearly, he hopes to reconcile a communitarian account of political obligations with an individualistic account of resource equality¹⁹ through yet another variant upon the public-private distinction. This is reemphasized by his assertion that

*our familiar convictions, which require government to treat people as equals in the scheme of property it designs but do not require people to treat others as equals in using whatever the scheme assigns them, assume a division of public and private responsibility. They suppose we have a duty in politics that does not carry over as any general duty of private life. . . . This argues, if we take the division of responsibility to be important and fundamental, for a compatible rather than a competitive conception of equality as defining public responsibility because compatible conceptions explain the division naturally and systematically, while competitive theories can explain it at best only artificially and improbably.*²⁰

What is sought is an account of equality which is compatible with private ambitions, private decision making, irrespective of whether or not these appear, superficially, to diminish equality overall.²¹ As Dworkin notes,

17 *Ibid.*, 299.

18 *Ibid.*, 206.

19 For an extended argument that this fails, see Ch. 6.

20 *Ibid.*, 299.

21 *Ibid.*, 174, 298.

if government succeeds in securing for each citizen a genuinely equal share of resources to use as he wishes in making his life successful according to his lights,²² his choices will give effect to rather than corrupt what government has done.

There is a problem here. Dworkin assumes both that political authorities must treat people as equals in the scheme of property they design, and that as private citizens we are entitled to act in ways which seemingly disturb that distribution, for example by favouring those close to us.²³ Yet if the example given above rings true, one important cause of the pervasive inequality of women in contemporary societies is that they frequently act in ways which enhance the life chances, as individuals, of those near to them, and that those same actions are profoundly disadvantageous to their own life chances, again strictly as individuals. Structurally, the opportunities open to women are frequently curtailed by the responsibilities they are conventionally assigned. The same is not true to the same extent of the majority of men.

THE DIFFERENCE PRINCIPLE: THE LEAST ADVANTAGED GROUP

In many ways, Rawls is both more radical and more wholly traditional than Dworkin. His distributive model focuses upon groups, rather than individuals, enabling him to elude altogether any need to consider the effects of human relationships upon the model of distributive justice he proposes. Rawls emphasizes that the least advantaged, in terms of the difference principle, *'are defined as those who have the lowest index of primary goods, when their prospects are viewed over a complete life.'*²⁴ He further emphasizes that, at least for the purposes of establishing a just distribution, group membership is viewed as fixed and that social mobility is not considered a primary good. Equally, he clearly considers social groups such as families a part of private society. Like religious groups, clubs, and various cultural groups and associations, they are internally structured, pursue ends of their own. Such groups are to be supported, to the end that the most disadvantaged among them ought to be the beneficiaries of any improvement in the lot of the more fortunate, but the equality aspired to is a relative equality among the smaller groups and associations of which the political community is composed, rather than more deeply individualistic in character. In this way, by offering a principle of equal liberty which directly addresses individuals and their independence, and a redistributive principle which acknowledges the reality of social groups, Rawls attempts to

²² *Ibid.*, 299.

²³ *Ibid.*, 298. It is significant that Dworkin has at no time addressed intergenerational questions. Thus, he has not confronted the question of how we are to favour those close to us, for example, our own children without increasing inequality generally. He has also not confronted the intimate connection between a strong preference for saving, for example, and the desire to provide one's children with enhanced resources in later life. He does, however, allude to the similarity in this respect between his account and libertarian accounts, emphasizing that both are compatible with private choices and decision making.

²⁴ Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 164.

establish a balance between the moral demand for independence, a demand he believes to be intrinsic in the nature of citizenship, while recognizing as well that independence is only possible under circumstances where all people are guaranteed an adequate share of social and economic resources. Both the recognition of the connection between social and economic well-being and personal independence and the lexical priority of the principle of equal liberty emphasize the difficulty of the task undertaken. Rawls wishes both to ensure the continued existence of private choices and freedoms (preserving the privacy and the integrity of the smaller groups of which political society is comprised) and to ensure that these are extended to all those who now rank as citizens.

Rawls' emphasis upon social groups, rather than individuals, in developing his account of the difference principle is disturbing. While, clearly, a significant reason for this choice is the degree to which it facilitates the use of economic indicators, and he does, in fact, tentatively identify the least advantaged group with unskilled workers, both his emphasis upon social groups and his clear concern with sustaining the integrity of the smaller groups of which the nation state is comprised suggests a failure to consider with sufficient clarity the 'nested' character of these groups. If, for example, following Rawls, we assume that the least advantaged group is comprised of unskilled workers, and it is the members of this group who must benefit from any increase in the well-being of the most advantaged, we must also recognize that while, on one level, this group is comprised of individuals who presumably benefit equally from redistribution, on another level, these individuals are themselves part of further social groups, most particularly families. An improvement in the well-being of labourers as a group may lead to a corresponding improvement in the well-being of their wives and children, but there is scant reason to assume that this is in fact the case. While more resources may enter any given family under the difference principle, the allocation within it need not reflect this. Certainly, in the recent past, studies have shown that increased wages for the husband are not generally reflected in increased housekeeping money for the wife.²⁵ Rawls fails to consider that, for the most part, the members of his least advantaged group are not simply individuals, but members of families, and, given this, also fails to acknowledge that distribution within families is at least as significant as distribution to families. *Just as we cannot simply assume that existing political and economic arrangements are just within the wider society, we cannot assume that existing arrangements within families are just, nor can we assume that justice is inappropriate within families. Such assumptions must be justified and supported by argument, and the arguments essential to sustain and support them have yet to be advanced.*

25

See Rowland, *loc. cit.*, 98. Rowland cites British studies demonstrating that increased wages to the husband were not generally reflected in the provision of increased housekeeping to the wife. See also the studies to the same effect cited in M. Eichler, *The Double Standard: A Feminist Critique of Feminist Social Science*, London, Croom Helm, 1980, 38.

While Rawls' alternative identification of the least advantaged group with those *individuals* with less than half the median income and wealth eludes some of these difficulties, it poses problems of its own. Unlike class position, this measure of disadvantage is unlikely to remain stable throughout the individual life *if women are considered*. Thus, for example, while a young professional woman in full-time employment is clearly advantaged²⁶, should she leave paid employment for a period of years to raise a family, unless she has, while working, amassed substantial wealth thus providing an ongoing income and independent resources, it would appear that she becomes disadvantaged during this period irrespective of the economic position of the household of which she is a part. The alternative, of course, is the *empirical* assumption that she shares equally in family resources and in decision making concerning the utilization of these resources. Should her marriage end after a number of years, while she may receive a relatively equal share of existing family assets, she is unlikely to fully regain her advantaged position, even assuming that the employment disadvantages currently experienced by women with family responsibilities can be legally eradicated. Given Rawls' emphasis upon relative position over the whole of the human life, even if many women remain above the least advantaged group, the fact that when we compare men and women of comparable 'natural advantages' women remain disadvantaged by comparison to their male counterparts at all economic levels and throughout their lives is surely of more than passing significance.

Rawls may, of course, assume either that 'the family' will gradually cease to exist or that the disadvantages which arise from family membership and family roles are irrelevant to the principles governing the basic structure. The former assumption might be thought to arise from his view that equality of fair opportunity can only be imperfectly realized so long as the institution of the family continues, however, contextually interpreted, this refers not to gender roles but to the advantages and disadvantages conferred by family background.²⁷ The latter supposition seems the more likely, particularly since Rawls explicitly identifies two further empirical assumptions, first, that power and authority are correlated with income and wealth so that only the latter two need be considered in the formulation of the difference principle, and, second, that once the basic structure of society has been regulated justly, other inequalities which arise as a consequence of the voluntary choices of individuals may be disregarded.²⁸ This latter supposition, of course, emphasizes the distinction noted elsewhere between the institutional structure of society and the consequences of private choices and private decisions. Yet this supposition, as well, seems profoundly at variance with the empirical conditions of women's lives. Even if, counterfactually, the institutional structure throughout society rigorously eliminated all structural barriers to equality for women, even if

²⁶ Under existing social and economic arrangements she is likely to be somewhat less advantaged than her male counterpart, however, again, I assume, *arguendo*, that appropriate legislation can alter this.

²⁷ Rawls, *A Theory of Justice*, *loc. cit.*, 74, 300 ff.

²⁸ *Ibid.*, 95-100.

employers were required at all levels to disregard biological sex in employment, in training and in opportunities for advancement, to the extent that women remain disproportionately responsible for domestic labour and emotional servicing, existing patterns of disadvantage may be mitigated but will not be eliminated. That Rawls might find this sort of continuing disadvantage acceptable is supported by his observation that

*primary goods are not, however, to be used in making comparisons in all situations but only in questions of justice which arise in regard to the basic structure [and that therefore] it is another matter entirely whether primary goods are an appropriate basis in other kinds of cases.*²⁹

Rawls emphasizes that the concept of a need is always relative to the concept of a social role, and that the only role with which he is concerned is that of citizen.³⁰ Yet this remains unsatisfying, incomplete. If, as is the case for many women in contemporary communities, their other social roles effectively deprive them of a fair share of those goods they require to participate as equals in public life, they are deprived as citizens. While, as wives or mothers they may well have other needs, these are additional and ought not be thought to substitute for their needs as citizens. Unless we are prepared to ensure that families are themselves structured on just principles and to consider precisely what is required, we must, I believe, consider all the individuals within them simply as citizens and as entitled, as such, to a fair share of social goods.

Rawls emphasizes the internal integrity and continued existence of the social groups within the pluralist nation state together with the normative structures which ensure their continued vitality in recent writings. Indeed, he characterizes a well-ordered community constituted according to just principles as constituted by an overlapping consensus among smaller internally cohesive communities sharing common ends. He notes that

*faced with the fact of pluralism, a liberal view removes from the political agenda the most divisive issues, pervasive uncertainty and serious contention about which must undermine the bases of social cooperation.*³¹

Such issues include the truth of all general and comprehensive theories, be they religious, moral, philosophical, or political. Rawls cites as examples utilitarianism, perfectionism, idealism and Marxism, as well as the comprehensive liberalism of Kant and Mill.³² Likewise, concrete views concerning the nature of the good life and the appropriate modes for its realization have no role to play in a political conception of justice. Issues touching on these

²⁹ Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 163.

³⁰ *Ibid.*, 172.

³¹ See generally Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.* The passage quoted may be found at p. 17.

³² *Ibid.*, 2-8. See also the discussion in Ch. 2.

are, so far as is possible, to form no part of the public agenda. Their truth or otherwise lies beyond or outside of politics. Rawls argues that since no public agreement on disputed questions of this sort can reasonably be expected, an alternative basis for a stable public consensus must be found. To this end, he argues further that,

*just as a political conception of justice needs certain principles of justice for the basic structure to specify its content, it also needs certain guidelines of enquiry and publicly recognized rules of assessing evidence to govern its application.*³³

These comprise the socially shared methods of common sense and the public knowledge available to common sense, together with the non-controversial procedures and conclusions of science, the basic procedures of science being presumed to be value-neutral, an issue which is itself controversial. Rawls comments that, '*in a pluralist society, free public reason can be effectively established in no other way.*'³⁴ It remains difficult to understand, given the fact of pluralism, what issues remain a part of the public agenda and which have been ruled out. Rawls suggests that controversial issues remaining on the public agenda include such issues as where to establish the boundary between church and state and the interpretation of the requirements of distributive justice. Yet it may well be that issues concerning justice within families, and indeed, full consideration of the implications of distributive justice for women, are, at present, as deeply divisive within pluralist societies such as England, the United States and Australia as those, such as the truths of religion and the possibility of reinstituting serfdom and slavery, which Rawls clearly rules off the public agenda. Given that beliefs and values concerning the nature and structure of family life, the role of women within the family, and, by necessary implication within the wider community, and the 'rights' of parents in respect of their children and the nature of their socialization and education are fundamental to most of the ongoing communities of which the consensus is to be comprised, *form the foundation of their beliefs concerning the good life*, and given that, at this time, such issues remain profoundly controversial and deeply divisive, their place upon the political agenda remains open to question.

Rawls comes closest to addressing these issues in a brief passage concerning the education of children and the impact of public requirements on religious sects who have chosen to remain apart from modern culture. He comments that a purely political conception of liberalism such as his would *not* allow the state to impose requirements designed to inculcate the values of autonomy and individuality. Rather, it would limit public requirements to ensuring that children were aware of their constitutional and civic rights in order to ensure that they were aware that freedom of conscience existed and apostasy was not a crime, thus protecting their future interests. Likewise, the state would be entitled to require that their education prepare them to be self-supporting and to be fully cooperating members of society

33 *Ibid.*, 8.

34 *Ibid.*

committed to the public virtues of tolerance and mutual respect and cooperation.⁵⁵ Rawls is attempting to demonstrate that the charge that political liberalism is arbitrarily biased against certain conceptions of the good is based upon a misunderstanding of its requirements, requirements which are substantially less stringent than those inherent in the comprehensive moral visions of earlier theorists, even while admitting that these requirements themselves may diminish the continued viability of such communities.³⁶ He concludes by noting that

*the state's concern [with the education of children] lies in their role as future citizens, and so in such essential things as their acquiring the capacity to understand the public culture and to participate in its institutions, in their being economically independent and self-supporting members of society over a complete life, and in their developing the political virtues, all this from within a political point of view.*³⁷

This passage, together with the arguments in which it is embedded, raises more questions than it resolves if girls and women are made the centre of analysis. It has already been argued that culturally conventional gender roles are fundamental to the inequality of women, not peripheral to it, that these gender roles are not innate, but socially constructed and learned, and that these same roles make it profoundly unlikely that many women will become 'economically independent and self-supporting members of society over a complete life'. Many cultural groups regard economic independence as inappropriate for women, as antithetical to their values and beliefs. For such groups, the sort of education which would emphasize values such as economic independence and self-sufficiency as equally appropriate and desirable for girls, which would emphasize equivalent career options and life chances, and, crucially, would view such emphasis as the state's proper concern, might well be seen as profoundly invasive. Would Rawls' political conception of liberalism require this? He argues that his conception is one appropriate to politics, and not to the whole of the human life, and that the ideas of the good included must be specifically political ideas, ideas derived exclusively from his conception of citizens as free and equal moral persons,

*so that we may assume (1) that they are, or can be, shared by citizens regarded as free and equal; and (2) that they do not presuppose any particular fully (or partially) comprehensive [moral] doctrine.*³⁸

Yet if women and girls are central to analysis, not peripheral, it may be either that his

35 J. Rawls, 'The Priority of Right and Ideas of the Good', 17 *Phil. & Pub. Aff.* 251, 267 (1988).

36 I note in this context that under the Rawlsian conception, the United States Supreme Court decision in *Wisconsin v Yoder* 406 U.S. 205 (1972) would have been reversed. In that case, Amish parents were allowed to remove their children from the education system after Grade 8, a decision which, given American conditions, would render such children unable, as adults, to support themselves within the wider community.

37 Rawls, 'The Priority of the Right and Ideas of the Good', *loc. cit.*, 268.

38 *Ibid.*, 253.

conception presupposes just such a doctrine, or, perhaps, that, extending its principles fully to girls and women and ultimately to the family would destroy the foundation for the overlapping consensus of which he speaks and threaten the existence of the private sphere he wishes to protect.

CIVIL SOCIETY AND HUMAN NEEDS

While the accounts of Dworkin and Rawls differ in structure, both accounts offer a distinctively liberal response to the legal and political changes involved in the development of the social welfare state and outlined earlier in this chapter. Both theorists rely upon curiously similar accounts of the liberal individual, or citizen, offering as their model rational adult individuals who perceive themselves as independent and seek a just division of social resources to ensure that they will remain so. This arises in part because egalitarian accounts, however different they appear, necessarily share certain features in common. They must attempt to reconcile the postulated rational public order with their knowledge that all individuals share certain social and biological needs. Thus, they aspire to offer an account of political society with the capacity to make good on the fundamental promise of liberal theory, that of securing citizens against the possibility that they will be subjected to domination by others. Earlier liberal theorists argued that because men naturally acted to maximize their own satisfaction and because, in general, men sought the same things, those who were stronger would be able to take advantage of others. Competition unrestrained by laws was likely to be ruthless, and no man could be secure in the possession of goods which others desired. By substituting the rule of law for the rule of men, and by ensuring that all men were formally equal before the law, men would be protected against the unrestrained self-interest of others. No man could achieve unjust dominion over his fellow citizens because they would all be subject in the same way to the rule of law. Because, in general terms, the law imposed limits upon the means men might use to obtain those things they wanted but did not dictate what men ought to want, men remained free. The classic liberal creed became the belief that men's freedom of action ought be curtailed only where their actions issued in concrete harm to others.

Contemporary egalitarians have cast their theoretical net more widely. They recognize that social conditions such as poverty and prejudice place many people in situations where they cannot look after their own interests adequately, perhaps are unable to identify those interests they have. They acknowledge that people do not choose to be poor any more than they choose to lack the basic skills needed to protect themselves in an increasingly complex social world. They do not choose to belong to minority religious or racial groups which are subject to majority prejudice, nor are they necessarily responsible for choosing their sexual preferences. The biological accidents of race or sex, the disadvantages imposed by limited ability or physical handicaps are factors over which individuals have no control. Yet morally arbitrary differences such as these enable some individuals to dominate others. Government, therefore, is obliged to protect its less favoured citizens in the same way as it protects those more favoured in the natural lottery. Modern liberal theorists recognize that if

this is to be done, a new division must be established and justified between the powers and prerogatives of political and legal authorities and the private satisfactions of ordinary social life. Egalitarians acknowledge that men and women may be dominated by circumstance and by misfortune as readily as by force or fraud and that they are entitled to be secured against this possibility so far as is possible. Yet, it is not clear how this may be done if any aspect of human life is to remain immune from political intervention and supervision.

Many of the factors which make some people more vulnerable and less able to compete effectively in the marketplace and less able to protect their legal rights and entitlements also make them more vulnerable in ordinary social life. Often, entrenched social and cultural beliefs reinforce this vulnerability, suggest that it is natural or appropriate, and such beliefs effectively disable those about whom they are held from asserting and defending their rights. What I am saying here is very simple, but all too often overlooked. Those who are vulnerable and constrained by their vulnerability to submit in one area of social life are profoundly unlikely to have the independence and the self-esteem to adequately protect their interests in others. They have learned to be victims, learned to accept as appropriate their status as victims, and this is often sufficient to ensure that they will be effectively unable to assert their rights in other contexts.³⁹ Simply assuming that life within families and other small groups and associations will be rich and satisfying as does Rawls provides no answer at all. Like other assumptions, it is open to factual challenge, and, in the case of family groups, presumes the resources provided both can and will be shared equitably within the group and that adult family members perceive themselves as equally entitled to make decisions and choices and thus to act autonomously. It is no longer adequate for a theory of justice to assume that the distributive consequences of basic human relationships are irrelevant to justice. If that area of human life which is, on a personal and individual level, most pervasive and significant, is to be consigned to the natural and pre-political, it is necessary both to justify the separation of our lives into political and pre-political realms, and to demonstrate that the barrier thus created can be rationally defended by argument, not simply asserted or assumed, nor argued for upon the basis of existing social and historic conditions, including the fact of pluralism.

A PUBLIC ETHIC OF CARE AND RESPONSIBILITY: THE INDIVIDUALISTIC RESPONSE

³⁹ The difficulties faced by women trapped in abusive relationships are illustrative. Many such women perceive themselves as unable to extricate themselves from such relationships precisely because they are socially responsible for maintaining and preserving relationships. They perceive themselves as to blame for the abusive character of the relationships in which they find themselves, and this is frequently reinforced by social and cultural attitudes which hold women responsible for maintaining relationships and view it as their duty to endure abuse. Likewise, those women who have experienced abusive relationships in childhood are least likely to extricate themselves from abusive adult relationships. See C.F. Swift, 'Surviving: Women's Strength Through Connection' in M.B. Straus, *Abuse and Victimization Across the Life Span*, Baltimore, Johns Hopkins Univ. Press, 1988, 153, esp. 161.

Now it is time to examine much more closely contemporary egalitarian attempts to justify a public ethic of care and responsibility within the constraints of liberal ideology. Because this difficulty is most pronounced in a wholly individualistic account we will turn first to Dworkin's attempt to reconcile a public commitment to substantive equality with an individualistic theoretical structure. As he has argued, while, as individuals we do not believe that we are individually obligated to treat all our fellow citizens with equal concern, we do believe that our government has such an obligation to its citizens. The question, of course, is what equal concern demands, and when we, as individuals, also have such an obligation. Another way of putting these questions is simply to ask upon what occasions and under what circumstances we ought to consider ourselves to be responsible for one another's well-being. When must we reason, not simply in terms of rights and entitlements, but in terms of responsibilities and preserving and sustaining ongoing relationships, in terms, in short, of an ethic of care? When must we, as individuals, demonstrate equal concern for our fellows?

An egalitarian account of distributive justice which endeavours to remain individualistic, as does that offered by Dworkin, must either account for the place of human relationships directly, or acknowledge that the ideal it offers will not survive any attempt to translate it into practice. As we saw earlier, he theoretically defines equality of resources as that set of social outcomes which would follow if, counterfactually, all members of the community were equal in natural endowments and if all the resources available within the community were allocated in such a way that no individual envies the bundle of resources held by any other individual. The critical assumptions are as follows. In a situation of relative abundance, if approximately equal individuals have equal capacity to secure those resources which they desire, they will seek to further their interests so far as is possible given their preferences and the preferences of others. The test for whether an egalitarian distribution has been attained he calls the 'envy test'. That is, we may assume an egalitarian distribution has been reached if no individual envies the bundle of resources available to any other individual. Under free market conditions, where individuals are thereafter at liberty to utilize and exchange their bundles of resources as they see fit subject to the rule of law, the distribution will remain equal so long as individual endowments remain equal. So long as the envy test is met, so long as no individual envies either the initial bundle of resources allocated to another or the entire bundle of life choices and decisions involved in their utilization the demands of equality are met.⁴⁰ A question one might wish to ask here is what might be said of those

⁴⁰ Dworkin's utilization of 'envy' in assessing whether or not an egalitarian distribution has been attained is extremely interesting. For his account of the structure and role of the 'envy test' see Dworkin, 'Equality of Resources', *loc. cit.*, 285-288, 304-309. His use of envy in this context demonstrates some affinity with Rousseau, although, unlike Rousseau, Dworkin is careful to distinguish envy of what another has, which he identifies with an unjust distribution, and envy of what another is, which is a moral flaw. In 'Discourse on the Origin of Inequality Among Men' Rousseau identified envy as one of the social evils leading men to surrender their freedom. Likewise, in 'A Discourse on Political Economy' he emphasized that one of the most important roles of government is to ensure that extreme inequality of wealth does not arise among

women who would prefer the bundle of life choices generally available to men in our culture, or who might wish that their children were male simply because men do not characteristically confront many of the conflicts faced by women, such as that between ambition or achievement and parenthood. What of the women who do envy the bundle of life choices open to men, *including the lack of conflict between parenthood and ambition?*⁴¹

A model such as this places many women in a parlous position in the long term. Consider the case of an educated woman who has married, bore two or three children, and subordinated her labour market activities to nurturing her children and maintaining a home for her family. If, as is becoming commonplace, her marriage breaks down after a period of eight or ten years, her particular bundle of choices in resource utilization and life activities are likely to have placed her in a significantly disadvantaged position. Any professional qualifications she may have obtained before marriage are likely to be much less valuable than they would have been had she followed an uninterrupted career path. Both her years out of the labour market and her socially defined status as mother make her a less valuable employee in comparison to the recently qualified and to those whose workforce participation has not been interrupted. She is unlikely to have maintained benefits such as superannuation and she may well find it necessary to rely upon redistributive payments to survive, at least in the short term.⁴² If she is asked whether she would have been willing to forego having children, or alternatively, to have foregone the years spent at home nurturing those children and maintaining a home for her family she is likely to deny this. The envy test is satisfied, that is, she does not *envy* the lives led by those women who have pursued uninterrupted career paths or who have combined professional careers with bearing and rearing children, nor does she

citizens because, where this is present, injustice is inevitable. See Rousseau, *The Social Contract*, *loc. cit.*, 212-221 & 267-287. See also Rawls, *A Theory of Justice*, *loc. cit.*, 530-541. Rawls explicitly excludes envy from the motivations which operate in the original position and notes that 'a rational person is not subject to envy, at least when the differences between himself and others are not thought to be the result of injustice and do not exceed certain limits.' *Ibid.*, 538. The distinction implied by this passage is very close to that adopted by Dworkin. Cf. the discussion in Nozick, *loc. cit.*, 239-246. Nozick suggests that social attempts to eradicate envy along one dimension will simply encourage it to flower along another. That is, Nozick believes that we have a fundamental propensity towards envy, and that to the extent that one area of social life is structured so as to remove any cause for envy, that sphere of life will become unimportant, no longer relevant to our self esteem. If equality of resources could be realized, if, in fact, society did devote an equal share of resources to the lives of each one of us, relative wealth and associated concepts would become socially unimportant. From that perspective, it may be that a part of the strategy of equality of resources is to make wealth irrelevant as a source of self-esteem. See Dworkin, 'Equality of Resources', *ibid.*, 331-3.

⁴¹ See Ch. 11 for a discussion of treating this form of disadvantage as a consequence of culturally embedded prejudice which is illegitimate and must, therefore, be eradicated.

⁴² In Australia, 90% of sole parents are women, 70% of all sole parents relied in whole or part upon a sole parent's pension, and 95% of these pensioners were women as of June 1988. Department of the Prime Minister and Cabinet Office of the Status of Women, *Women's Budget Statement*, Canberra, A.G.P.S., 1989, 208.

envy the life led by her former husband. She may, however, point out with some justice that the particular set of choices involved are so intimately connected with gender and gender roles and with the obligations associated with these roles as to seem an artificial basis upon which to construct any account of the meaning of equality. These bundles of choices are peculiar to women, and the problems women face in dealing with them, through time, are also unique to women, indeed unique to women in contemporary industrialized societies. Indeed, she might also, with some acerbity point out that she most certainly did not choose to exist upon a subsistence level income nor would she have done so. To a substantial extent, she simply complied with social and cultural expectations concerning the life choices and options appropriate to a woman of her background and status. If, in Dworkin's terms, she has gambled and lost, the gamble was one she was socially and culturally encouraged to take, and *one of which she may have been unaware at the point at which certain critical choices were made.*⁴³ She may, that is, simultaneously not regret having devoted her time to her family responsibilities, and regret profoundly her failure to protect and further her own interests. She, as well, is entitled to question the social choices which confront women in our culture.

One of the very real difficulties in attempting to apply an ideal theory account in which all choices operate against the background of resource utilization in which preferences concerning work, leisure and consumption interact to produce distributive outcomes lies in the acontextuality of the account itself. The choices described in the paragraph above are choices intelligible only within a particular social context. They are choices which are constrained by moral and social obligations which have arisen as part of social practices, not in isolation from them.⁴⁴ Within the framework of equality of resources, given its economic discourse of choices regarding work, leisure and consumption, it is not clear how such choices are to be characterized. Has she preferred leisure, for example, in abandoning the career for which she was trained, or is it simply that she has chosen to use her talents in work which may be personally rewarding and socially valuable but which presently commands no economic rent? In either case, it would appear she has chosen disadvantage. Did she perceive herself as having a choice, or did she perceive her obligations to her husband and children as overriding the existence of choice? If the latter, can we then describe her position following the failure of her marriage as the consequence of her choices? At the point at which her marriage failed what real choices, if any, were available to her?⁴⁵ Within Dworkin's framework does the

⁴³ For further discussion of the possibility that women gamble on marriage while men invest in it, see Ch. 10.

⁴⁴ We might, following Dworkin, term them associative obligations. For an extended discussion and an attempt to reconcile equality of resources and associative obligations, see Ch. 6.

⁴⁵ For a detailed exploration of these issues and particularly the discrepancy between abstractly defined freedom of choice and the constraints which operate when choice is contextually evaluated, see Ch. 6.

absence of choice in this sense even matter? In the real, real world, unlike the world of ideal theory, choices are multidimensional, not unidimensional.

If, as Dworkin asserts, the fundamental obligation of political authorities is to ensure that equal resources are available to each individual for him to use as he will in advancing his life plans, he must demonstrate that an account based upon the perfect market of economic theory possesses the flexibility to acknowledge the economic rent of household labour and parenting and to ensure that its 'true' value is received by those individuals responsible for its performance. If we recall the scenario above, her problem arose, not because she preferred leisure above economic activity, but because she chose to channel her available energies into homemaking and nurturing labour and because such work commands neither economic rent nor public sphere recognition. Indeed, we might well suggest that she chose to honour her obligations to her husband and children rather than to pursue her economic interests. Does it make moral sense to suggest that those who choose to honour moral obligations are, in effect, choosing disadvantage? Does it not make more sense to suggest that, to the extent this is and remains the case, basic social and political structures are fundamentally flawed? A very real problem here, of course, is the meaning of terms such as work and leisure. Is leisure simply time which is not devoted to income earning activity, or is it that time available to the individual for wholly discretionary use, time when one is free from obligatory activities generally? This distinction is critical to any attempt to address the position of women, however the very acontextuality of Dworkin's ideal theory account seemingly obviates any necessity which might otherwise arise to establish precisely the meaning of terms such as these. To the extent that 'private sphere' labour presently exists in the public eye, it exists as part of the ideology of the family, and this ideology dictates both that the labour involved is a labour of love (which is true in many cases) and that its worth would be denigrated were it to be seen in economic terms. The latter may also be 'true', but as a consequence love (unlike sex) has no exchange value in civil society. In the Dworkinian framework, it would appear, the simplest option would be to acknowledge the economic rent of such activities, including childbearing, as part of the on-going market he envisions on the ideal theory level, to treat its cultural absence as a market failure. Even if this were to be done, however, if one adopts the wages currently available to those who provide domestic services and child care in the marketplace as a guide to community preferences, her choice might still be described as choosing a less productive occupation in economic terms.⁴⁶

It is difficult to know how Dworkin would respond to the scenario offered above. The only remark in his account of equality of resources which seems immediately relevant is this:

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I should note here that with respect to 'women's work' we may be confronted by market failures *all the way down*. For an analysis of other available options and an argument that equality of resources is incomplete without a companion theory of equality of responsibilities see Ch. 11.

Equality requires that those who choose more expensive ways to live - which includes choosing less productive occupations measured by what others want - have less residual income in consequence.

Bearing and raising children might well be described as choosing a more expensive way to live in our present culture.⁴⁷ It requires the substantial expenditure of both labour and resources without a substantial return on either. Equally, of course, it may be said that she has in fact complied with the desires and expectations of a majority of those within the community, but that those same desires and expectations *have meaning only within a social practice* whose traditions insist that perceiving what she does in terms of money or money's worth is inappropriate. Put very simply, perhaps the community as a whole prefers both that she remain at home to care for her husband and children and that she expect no tangible economic reward for doing so. Put in this way such preferences seem utterly indistinguishable from the inequalitarian attitudes Dworkin argues political liberalism must condemn. Does Dworkin's liberalism condemn such arrangements?⁴⁸ Perhaps, in a bizarre sense, a market in household labour and parenting and perhaps even childbearing does exist, one which is in large part unregulated and in which the 'true cost' of a wife's services is precisely that amount her husband chooses to make available to her for her use. If this is the case, divorce may be interpreted as dissatisfaction either with the quality and quantity of the services provided or with the wages and working conditions on offer.

Yet elsewhere⁴⁹ in discussing the ways in which individuals ought to adjust their plans to take account of the interests of others and their degree of responsibility where their plans cause injury to the interests of others in the 'real, real world' Dworkin notes that where individuals do have a continuing relationship each particular decision ought to be treated

as part of a continuing series of linked decisions . . . [and therefore] if I forego an opportunity in one case, because the relative loss to you would be greater, this should be entered to my credit in a moral ledger against the next decision I (or you) have to make.

While these remarks were made in the context of establishing that equality of resources offered an attractive model for negligence and nuisance adjudication, they do suggest an alternative model for viewing family relationships. In many respects, marriage and family life represent the paradigm case of intersecting life plans. Returning to the hypothetical scenario above, and reinterpreting it in the context of this passage, the husband and wife might properly

⁴⁷ See Dworkin, 'Equality of Resources', *loc. cit.*, 327.

⁴⁸ Superficially, it would appear not to. His only direct mention of family relationships occurs in the course of an attempt to demonstrate that a patriarchal family might none the less impose genuine obligations upon its members if the group assumed that such practices were consistent with equal concern. Dworkin, *Law's Empire*, *loc. cit.*, 204-205.

⁴⁹ Dworkin, *Law's Empire*, *loc. cit.*, 305-306.

be said to have made a series of chained or linked decisions which, taken as a whole, have resulted in significant disadvantage to her life chances.⁵⁰ Viewed in this light, it becomes critical to attempt to ensure that the parties are relatively equal in decision making power, for if they are not the decision making process is likely to reflect, not negotiation and mutual decision making aimed at preserving a reasonable balance between competing interests, but the relative power of the individuals concerned. If, for example, such a decision was made because the cost to the family unit involved in her foregone opportunities was less than the cost in foregone opportunities involved in feasible alternative decisions, this passage suggests that she may have amassed a substantial credit to her 'moral ledger'.⁵¹ It would seem to follow that, should the marriage fail, she ought to be compensated for those foregone opportunities. A rough approximation of the cost could be obtained by first, calculation of economic returns already lost by withdrawal from the labour market and those likely to be lost in the future as a consequence, and second, by reducing the figure obtained in that manner by the economic benefits received during the course of the relationship.⁵² One ought, of course, also note that her husband has, through his choices, sacrificed opportunities to participate in family life and in the nurturing of their children, however these lost opportunities do not necessarily diminish the economic resources at his disposal, indeed, in the long term, they are likely to enhance them. It may well be that her services in the home have substantially freed him to pursue career opportunities not otherwise available and she may have provided services directly related to his career and which enhance his earning capability. Further, he has received the benefit of her services in the home, including childbearing and parenting services, and, in our culture, is conventionally entitled to determine their value autonomously.

50 *Women's Budget Statement 1989-90, loc. cit.*, 76. Australian government studies indicate that the average woman forgoes over \$300,000 in lost earnings for a first child, while a second and third lead to further losses of \$50,000 and \$35,000 respectively. The estimated opportunity cost of these decisions calculated upon the basis of investing the earnings at 5% was \$929,000, \$1,059,000 and \$1,145,000 respectively.

51 This also tends to suggest that a fundamentally utilitarian analysis is appropriate within families. I would, however, argue that within families, as elsewhere, we must take seriously the differences between persons.

52 It is important to note here that implementation of such a scheme of compensation might significantly increase pressure upon women to remain in relationships because the cost of terminating them would be prohibitive, an extremely important consideration in inequalitarian or abusive relationships. Any threat to leave would be likely, given a legal regime which presently makes no attempt to guarantee access to resources within marriage, to provoke violence, thus indirectly reinforcing imbalances in power and defeating voice. Whether such a scheme would, overall, enhance voice within such relationships and attempt to ensure that marital power was more evenly distributed than at present is a very different question. Certainly it might significantly deter formal marriage, increasing pressure to extend it to *de facto* relationships. Dworkin's account of associative obligations makes no distinction between formal and informal relationships, or at least none which could be said to depend upon the presence or absence of legal regulation. Rather, associative obligations arise in the context of social practices. See the figures in n. 51 above.

What can be said about ongoing relationships on such a model? At the level of social policy this interpretation of equality of resources treats marriage and family relationships as a special instance of intersecting life projects, and similar in that way to the conflicts between long time neighbours familiar in negligence or nuisance law. How might a government dedicated to equality of resources ensure that equality was not disturbed thereby? As a prophylactic measure a government dedicated to realizing equality might well find it appealing in the long term to design legislative programs aimed at minimizing the likelihood that the 'moral ledger' would become imbalanced in this way, rather than to resort to compensatory measures which would be both draconian, and, in other than wealthy families, nugatory. While, in the short term, compensatory measures would be essential, in the long term, it might be more appropriate to encourage, through taxation advantages and non-transferable leave provisions, role sharing, and to eliminate so far as possible existing provisions which effectively contribute to such an imbalance, such as the rebate presently available for a dependent spouse, which, under existing taxation regimes frequently discourages labour market participation, including participation on a part-time basis. Likewise, such a government might find it appropriate to ensure that employment opportunities were routinely available on a part-time basis which carried benefits and opportunities proportionally equivalent to those attached to equivalent full time employment. The aim of such programs, however, might be described in two quite different ways. Such programs might simply be described as aimed at, insofar as possible, sustaining equality of resources in the particular context of ongoing relationships in the sense of ensuring that economic disadvantages did not accrue disproportionately to one individual while economic advantages accrued to the other. They might also, however, be described very differently. Implicit in a program such as that sketched above is an effort to alter existing patterns of social choice by making certain choices which are presently socially attractive comparatively unattractive while making other choices substantially more attractive than they are at present. Thus, fully developed programs of this sort would, in pursuit of equality of resources, pursue two linked but distinct goals, the first encouraging men to play a more active and ongoing role within the family, and the second encouraging women to play a more active and ongoing role in the marketplace than is presently the case. What is at stake, clearly, is not simply a set of choices concerning the allocation of resources, but rather a set of choices implicating in a significant way beliefs fundamental to many individuals about a valuable sort of life for themselves, beliefs which Dworkin strongly suggests ought to be sacrosanct. Such programs, in other words, would actively seek to alter private sphere choices in pursuit of public equality. Within the framework Dworkin is seeking to develop, such would be legitimate only if existing practices can be shown to be fundamentally inegalitarian, a consequence of prejudice, and the preferences flowing from them corrupt.

Given that, as discussed earlier, Dworkin emphasizes that equality of resources is a principle of political organization required by justice and *not a way of life for individuals*, it is proper to consider in passing whether the 'moral ledger' alluded to in these unfortunately brief remarks is a principle of political equality derived from equality of resources or whether it

reflects moral obligations between individuals which are not politically enforceable, given that he also comments that '*we must rely on the hypothesis that if everyone treats such decisions as isolated cases, this will work out roughly fairly for everyone in the long run*'.⁵³ Dworkin's language suggests that while individuals ought, in their dealings with one another, take special account of maintaining a fair balance in ongoing relationships, decision makers must assume that treating such decisions as isolated cases will produce the fairest results overall. In matrimonial law, of course, such a hypothesis is wholly unworkable, and 'moral ledgers' routinely become increasingly imbalanced during the course of a long relationship. Yet Dworkin also suggests that the principle of comparative financial harm at work in the concept of a moral ledger must be qualified to take account of individual rights and that a straightforward test such as comparative financial harm is unlikely to provide a satisfactory basis for legislation. Unlike judges, legislators are not required to make policy choices which produce '*the allocations of rights and obligations that would have been negotiated by the parties specially affected*'.⁵⁴ The clear distinction between judicial responsibility and legislative responsibility made in these passages suggests that while judges ought to take such balancing into account in resolving disputes over marital property within an existing statutory framework, legislators must treat such issues as one aspect of overall social policy considerations in designing schemes of property, including marital property, and those decisions are likely to be most accurate, and *therefore most just*, if they reflect the distribution of *preferences* in the community as a whole unless those preferences are fundamentally inegalitarian, and illegitimate for that reason.⁵⁵

CONNECTIONS NOT MADE - SOCIAL PRACTICES AND INEQUALITY

As noted earlier, the attempted fusion of an ethic of care with traditional liberal premises has altered the scope of egalitarian theory in ways as yet unacknowledged by liberals. Any adequate egalitarian theory must address the intimate connection between the economic inequality of women, the cultural assignment of responsibility for domestic labour and nurturing to women, and the way in which women's private sphere roles have both shaped and curtailed their public sphere participation. To the extent that they fail to do so they also fail to recognize that many social practices which have become normative are unjust. When human is tacitly equated to adult male, issues such as childbearing and the value of nurturing and domestic labour vanish from the agenda. They simply do not exist, seem irrelevant to equality. The connection between gender roles and economic inequality is blurred as well, assumed to reflect lingering prejudices which can be addressed by conventional means. The fact that the increasing workforce participation of women has not been accompanied by any parallel

⁵³ Dworkin, *Law's Empire*, *loc. cit.*, 306.

⁵⁴ *Ibid.*, 311.

⁵⁵ Dworkin, 'Political Equality', *loc. cit.*, 23 ff. For a discussion of the role of prejudice, see Ch. 11.

increase in the participation of men in domestic and nurturing labour disappears altogether.⁵⁶ While a wholly individualistic account such as that of Dworkin ought to address these issues directly - at least if women are eligible to be considered as individuals - a more sophisticated account, such as that of Rawls, must demonstrate that its recognition of the necessity and vitality of various smaller social groups including families does not also carry with it tacit acceptance of private relationships of domination and submission, relationships which are hierarchical in character. Finally, because egalitarian theory advocates a public ethic of care and social responsibility as a central obligation of the political structure⁵⁷, this development must be reconciled with the apparent conflict between an ethic of care and an ethic of independence in other areas.⁵⁸

The intrusion of the ethic of care into the public domain poses a major challenge to the theoretical structure of liberalism. While both Rawls and Dworkin have sought to demonstrate that massive public provision of social insurance can be accounted for entirely as a rational outcome of self-interested choices by independent and mutually disinterested

56 In this context it should be noted that according to 'Women's Work is Never Done', *The Mercury*, 6th February, 1989, new Australian Bureau of Statistics figures showed husbands whose wives worked spent no more time doing housework than those whose wives did not. One example given was that working wives spent on average 42 minutes per day on laundry, while their husbands spent on average two minutes per day. The study referred to was J. Wilson, *Information Paper: Time Use Pilot Survey, Sydney, May - June 1987*, Sydney, Australian Bureau of Statistics. See also G. Allan, *ibid.*, 84-92. A summary of American statistics may be found in P. Voydanoff, 'Women's Work, Family, and Health' in Industrial Relations Research Association (Editorial Board K.S. Koziara, M.H. Moskow, L.D. Tanner) *Working Women: Past, Present, Future*, Washington D.C., The Bureau of National Affairs, Inc. 1987, 69, esp. 76-84. The author notes, p. 77, that '*employed women spend approximately 50 percent less time in family work (housework and child care) than full-time homemakers. Since husbands and children do not compensate for the lower amount of time spent by employed women, families with working wives spend less total time on family work. . . . Employed wives spend more total time in paid work and family work than men and full-time homemakers.*' See also the studies cited therein. Significantly, some of these studies have also shown that '*working wives have higher levels of marital power than full-time homemakers, especially in the area of financial decision-making.*'

57 Here I note that what I have termed the 'ethic of care' in egalitarian theory extends well beyond the redistributive role of government. Modern egalitarians seemingly advocate other public measures such as affirmative action programs to enhance the access of disadvantaged groups to educational and professional programs and measures protecting consumers against onerous contractual terms etc. Collectively, the emphasis of such egalitarian programs is upon political responsibility for the protection of weaker members of the community and for securing to them social benefits often taken for granted by the more favoured.

58 Dworkin characterizes the nature of this conflict very precisely when he notes that most of us believe that our governments have a responsibility to treat us as equals but that this responsibility is not one which carries over into any private responsibility. See Dworkin, *Law's Empire*, *loc. cit.*, 299. Put another way, we expect our government to simultaneously insist upon substantive public equality and protect our private independence in using the resources available to us even where this seemingly diminishes equality overall.

individuals, such arguments are, I believe, difficult to sustain. At a minimum, such arguments rely upon a series of assumptions concerning rationality, concerning the motivations underlying individual choice, and concerning the nature of value. For both Rawls and Dworkin, to be rational is to choose the most efficient and appropriate means for attaining the ends desired. Individuals make choices on the basis of interests which are in themselves, and therefore subjectively defined, choosing that which will most nearly satisfy their desires given the preferences of others. Value is defined by reference to the outcome of these same choices. Thus, as we saw earlier, Rawls, in establishing the basis for a shared conception of rational advantage, argues that all individuals require certain basic social goods, whatever their more comprehensive and subjective ends may be, and, because these are needed for any specific conceptions of the good they may desire to pursue, rational individuals will prefer a greater rather than lesser share of these goods. Similarly, Dworkin's account of equality of resources commences from the assumption that if individuals were equal in talents and differed only in preferences or values, a just distribution would be one in which no individual would prefer the total bundle of resources possessed by any other individual to that he has acquired for himself. Again, the worth of any given resource to the individual is defined by his or her preferences, and individuals are presumed to make their choices to further their own interests.

The real question is whether people do in fact make their choices upon this basis, or whether, in reality people as often make choices based on other factors, their obligations to others, their need to meet the expectations of others, perhaps even their recognition that choices which are profoundly attractive to them, as individuals, may do harm to others. While such choices, choices based upon obligations, or expectations, or a desire to avoid harm are indeed choices, and on one level might be said to further our preferences, on quite another level they lack the direct connection with the object of choice which seems necessary for the coherence of the argument as a whole. If, within the community as a whole, a substantial number of individuals make decisions based upon obligations, or the expectations of others, or a desire to avoid harm to others, while other individuals make choices which do in fact further their own interests as they perceive them, social outcomes are unlikely to accurately reflect the distribution of preferences within the community as a whole. These two types of choices are quite fundamentally distinct. Choices based upon obligations or fulfilling the expectations of others are choices made, not on the basis of the subjective desirability of the object of choice, but on the perceived value of the human relationships involved. The sorts of choices which predominate in equality of resources, on the other hand, must reflect the preferences of the individual for the goods or services themselves. To the extent that they do not an egalitarian distribution has not been attained.⁵⁹ If, for example, two individuals are involved in an ongoing relationship, and one of them tends to make choices based upon his or her perceived

⁵⁹ To adopt the language used by Dworkin in 'The Place of Liberty', *loc. cit.*, 34-36, such choices lack authenticity, in that they have not been formed under circumstances appropriate to using an auction as a test of equality of resources. See, further, Ch. 11.

obligations to the other, or in order to fulfil the expectations of the other, while the other makes choices upon the basis of the outcomes he or she actually prefers, the outcomes in terms of resource utilization, in terms of consumption and, perhaps even in terms of the allocation of work and leisure are likely to be distorted, particularly if this pattern recurs in many households. One consequence may be that, over time, the preferences of other-directed individuals are discounted because they have little impact upon market outcomes, while the preferences of self-directed individuals have a significant impact upon market outcomes. All that is required for this sort of distortion to become established is the assumption that a substantial number of other-directed individuals make the market decisions they do to further the interests of self-directed individuals.

The ontological assumptions underlying the liberal account of choice and decision making are undeniably appropriate at an asocial level. On such a level, whether characterised in terms of Rawls' original position or Dworkin's ideal theory account of equality of resources, this account of decision making is reasonable, indeed, represents the only plausible description. The account is constructed to ensure that no other grounds for decision making exist. Such difficulties as do arise reflect the fact that choices and decisions in a social context are seldom if ever so unitary or clear cut. While both Rawls and Dworkin attempt to divorce their arguments entirely from contentious ontological and epistemological assumptions⁶⁰, effectively arguing that they wish to offer a 'political' account devoid of broader foundational assumptions, this argument itself raises the question of why we ought to assume that an account constructed from the perspective of acknowledgedly mythical beings has anything to tell us about the structure of a just community. In evaluating the justice of real institutions in a fully social context such an account invites us to compare the choices and decisions made in the real world with those which would have been made had the strictures of ideal theory been met. Thus, returning to the hypothetical account offered earlier, we are invited to compare her choices and the social outcomes attending those choices with the choices and the outcomes which would have obtained had her choices been made under ideal theory conditions.

Under ideal theory her choices in work, leisure and consumption would apparently have been made *without regard* to human relationships, most particularly her relationships with her husband and children and her obligations to them. She would simply have sought to satisfy her own preferences in terms of work, leisure and consumption as fully as possible, given the preferences of others. We are, after all, using as a theoretical model the choices which would

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In Rawls, 'Justice as Fairness', *loc. cit.*, Rawls argues that, given the nature of modern constitutional democracies it is essential that '*the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines,*' that we must, in effect, '*apply the principle of toleration to philosophy itself.*' See p. 223. Dworkin makes the same point when he asserts that '*liberalism does not rest on any special theory of personality, . . . the liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals. . .*'. See Dworkin, *A Matter of Principle*, *loc. cit.*, 203.

have been made by *adult castaways* seeking to divide resources fairly among themselves. Had her choices actually been made upon this basis, she *would* have no cause for complaint. When we compare hypothetical ideal theory outcomes with real world outcomes, however, she remains significantly disadvantaged. A further problem which arises in bridging the gap between ideal theory and the real world and is the fact that, in the real world, both men and women do, on the whole, prefer to engage in relationships with others and to have children, yet when these facts are reintroduced at the ideal theory level, the problems which the ideal theory account was designed to circumvent reappear. The important and difficult issues concerning the structure of a just community arise precisely because our choices in the real world and the choices at ideal theory level seem incommensurable. When this difficulty is linked with the basic egalitarian presumption that all individuals (irrespective of race, class, gender or role) ought, in principle, to have their interests equally considered and represented in political society, the public-private distinction is stretched to the breaking point.

The problem with such accounts is not their reliance upon an artificial account of human nature and motivation coupled with an inadequate set of assumptions concerning what we know about ourselves and about others, but the way in which these assumptions reinforce a highly questionable distinction between our private and public lives, between the catalogue of public virtues we regard as fundamental to justice, and the concrete forms of life our beliefs concerning truth and the status of values lead us to strive to realize. It is not being suggested that such an account is sceptical or indifferent to truth, nor that in striving to avert conflict upon questions in respect of which political agreement appears unlikely it becomes merely prudential although this second issue will be addressed subsequently. Rather, it is argued that until such assumptions are re-examined, and reasoning proceeds upon the basis that the requirements of justice are the minimal requirements of a sociability which respects our real or potential equality in all contexts, not merely political life, and wider and more comprehensive moral theories add to and elaborate upon these acknowledgedly minimal requirements, little progress will be made.

Initially, Dworkin attempted to address the proper role of preferences or beliefs about the nature of the good life in political decision making through a distinction between personal preferences - a desire that certain goods or services be available for one's own enjoyment - and political or external preferences - preferences that social goods or services be either denied to or provided to others. Against the background of public decision making roughly based upon preference utilitarianism, he argued that despite the egalitarian appearance of decisions made in this way they were actually profoundly anti-egalitarian, in that if external preferences were taken into account equally with purely personal preferences

the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce

*resources, but on the respect or affection they have for him or for his way of life.*⁶¹

While Dworkin acknowledges that often (I would suggest always) '*personal and external preferences are so inextricably tied together, and so mutually dependent*'⁶² that coherent discrimination between them is impossible, he uses this further elaboration to suggest that upon issues where this is likely, majoritarian decision making is impermissible.

Recently, he has offered an intimately related distinction based, not upon preference utilitarianism, but upon his own theory of equality of resources. He now argues that political decisions fall into two distinct types or classes, '*those involving mainly . . . choice-sensitive issues, and those involving mainly choice-insensitive issues.*'⁶³ Choice-sensitive issues are those in which, as a matter of political morality, the right answer depends upon consideration of the character and distribution of communal preferences, whereas choice-insensitive issues are those such as the availability of the death penalty or those concerning racial discrimination in which, again as a matter of political morality, preferences ought not be taken into account.⁶⁴ I conclude from this elaboration, albeit tentatively, that he may have concluded that the distinction between personal and external preferences is unworkable. If I read his current arguments correctly, in areas in which decision making is choice-sensitive what is relevant is the character and distribution of the preferences actually held. Whether those preferences are personal or external is irrelevant, perhaps because the distinction is too fragile to do the work required of it.⁶⁵ Where an issue is potentially choice-insensitive, however, this question is likely in and of itself to be a matter of controversy within the community. Dworkin argues that the question of whether or not a particular issue ought to be treated as choice-insensitive is itself choice-insensitive, and that it is precisely these issues which, in a constitutional democracy, ought to be determined by judicial review rather than by some variant on the democratic process. Whereas judicial review is profoundly anti-democratic if used to set aside political decisions which ought, for the sake of accuracy, to depend upon the nature of preferences within the community, it furthers the goals of democracy where it has the capacity to improve the accuracy of political decisions, as in choice-insensitive issues. This group of

⁶¹ Dworkin, *Taking Rights Seriously*, *loc. cit.*, 235. More generally see pp. 234-239.

⁶² *Ibid.*, 236.

⁶³ Dworkin, 'Political Equality', *loc. cit.*, 24.

⁶⁴ While Dworkin offers us little concrete help in characterising issues as falling into either group, his overall use of the distinction strongly suggests that issues of distributive justice are fundamentally issues of social policy and therefore choice-sensitive, while issues such as racial or religious discrimination and capital punishment are choice-insensitive. See 'The Place of Liberty', *loc. cit.*, 51-52 and the further discussion of this distinction in Chapter 11.

⁶⁵ For a cogent appraisal of the problematical nature of the distinction between personal and external preferences, see West, 'Liberalism Rediscovered', *loc. cit.*, 714-722.

political decisions, Dworkin argues, are characteristically issues of principle, and on such issues the preferences of a majority ought to be irrelevant. An accurate decision upon such matters ought not depend in any significant way upon the attitudes and preferences actually present in the community.

The political agnosticism advocated by Dworkin's liberalism is in that way stringently limited. While certain decisions ought, as a matter of political morality, depend substantially upon the distribution of preferences within the community, others depend, not upon the distribution of preferences, but upon the concrete content of the basic requirement that government treat all its citizens with equal concern. Dworkin initially identified the fundamental obligation of government as one of treating its citizens with equal concern and respect, however, in more recent writings the references to respect have been dropped.⁶⁶ It may be that Dworkin now perceives that distinction to have been superseded by the division between choice-sensitive and choice-insensitive issues. If recognition of the capacity for forming and acting upon intelligent conceptions of a worthwhile life for ourselves once identified with equal respect is best acknowledged by accurate determination of choice-sensitive issues and a political process which distributes political impact approximately equally in respect of such issues, this might be the case.⁶⁷

Despite this, questions remain. As Dworkin acknowledges, determination of whether a given issue is choice-sensitive or choice-insensitive will itself be controversial. Dworkin suggests that choices concerning whether public resources ought to be expended on freeway construction or on a sports centre epitomize choice-sensitive issues. These are policy decisions, decisions concerning the proper allocation of scarce public resources given broad communal goals. On similar reasoning, choices between funding for business development

⁶⁶ In this context, it is critical to note that whereas in *Taking Rights Seriously*, *loc. cit.*, esp. Ch. 6 & 9, Dworkin emphasized a 'right to equal concern and respect' in more recent writings, including *Law's Empire*, *loc. cit.*, esp. 195-206, and 'Political Equality', *loc. cit.*, he refers explicitly to a right to equal concern only. I believe the alteration to be of some significance, given that in *Taking Rights Seriously*, *ibid.*, 272, Dworkin explicitly identified the right to equal concern with our human capacity for suffering and frustration, and the right to equal respect with our capacity for forming and acting on intelligent conceptions of how our life should be lived. See the discussion to be found in Ch. 6 & Ch. 11 of the ways in which equality of resources attempts to distinguish between legitimate and illegitimate preferences.

⁶⁷ I must note, however, that Dworkin's apparent abandonment of equal respect, an abandonment particularly noticeable in his account of associative obligations, seems to me to weaken substantially the egalitarian impact of his overall theory. Cf. his account in *Law's Empire*, *loc. cit.*, 204-205 of the possibility that a patriarchal family which sincerely believed that women were equal might, nonetheless, also believe that equal concern required paternalistic protection for girls and women in all aspects of family life. Even were such attitudes consistent with equality of concern, the kind of paternalism involved explicitly denies that girls and women are entitled to equal respect. Their capacity for forming and acting on intelligent conceptions of how their lives should be lived appears to be irrelevant. See the detailed discussion of this issue in Ch. 6, and, further, in Ch. 11.

grants, construction of day care centres and shelters for the victims of family violence would also seem to be choice-sensitive. As Dworkin notes, though such decisions involve a wide variety of issues, ranging

*from issues of distributive justice to . . . sound environmental policy, information about how many citizens want or will use or will benefit directly or indirectly from each of the rival facilities is plainly relevant, and may well be decisive.*⁶⁸

Despite this, it may well be that the need for more and more adequate day care centres and the need for more accessible and adequate refuges for victims of domestic violence are implicated in a fundamental way in the broader question of substantive equality for women and are issues in which the apparently abandoned distinction between personal preferences and external preferences may be directly relevant. Communal attitudes toward increased funding for day care centres, for example, may well be profoundly dependent upon attitudes concerning working mothers, beliefs concerning traditional family roles, assumptions regarding the need of young children for constant maternal attention, and attitudes concerning the impact of women in the workforce upon male employment. Likewise, attitudes concerning increased funding for women's refuges may well depend upon beliefs concerning the prevalence and nature of domestic violence, the responsibility of victims of such violence for provoking or instigating it, and still extant beliefs that a married woman has a duty to remain with her husband irrespective of his violent conduct.⁶⁹ Ought such issues then be perceived as choice-insensitive, as comparable to a decision concerning the legitimacy of capital punishment or racial discrimination in employment? If the connection drawn between the distinction Dworkin currently draws between different types of political decisions and his earlier distinction between personal and external preferences is correct it would appear so. If, on the other hand, this interpretation is flawed, if political morality requires that this sort of choice, one which seemingly involves a decision about which policies would offer the greatest benefits to the community as a whole, be made, at least in part, on the basis of community preferences, irrespective of whether these preferences are personal or external, it may be that policy decisions such as this, together, perhaps with a policy decision to restructure the taxation system to encourage greater market participation by women and greater family participation by men must depend upon altered community attitudes concerning appropriate ways of structuring family responsibilities and family life. All our preferences, even those as apparently individual and personal as, for example, sexual preferences, are inextricably linked with our view of our own positions and with how we wish to relate to others, how we see ourselves with respect to others. Preferences are neither formed in isolation nor can they be

⁶⁸ Dworkin, 'Political Equality', *loc. cit.*, 24.

⁶⁹ *Women's Budget Statement 1989-90*, *loc. cit.* 20 notes that one-fifth of Australians condone male violence against partners and one-third regard domestic violence as private and outside the scope of community responsibility.

realized in isolation. Rather, they are an expression of the ways we wish to live in company with others. It follows, of course, that, to the extent that social policy issues such as those canvassed above are characterized as choice-sensitive issues, Dworkin has not successfully eliminated the difficulties raised by the earlier distinction between personal and external preferences. Many communities might well prefer that scarce resources be devoted to recreational facilities or to a concerted effort to eradicate violent street crime, rather than to the provision of adequate child care or protection for women against violence in the home. The real problem is very simple. Within the framework advocated by Dworkin, most legislative decisions are fairly clearly policy decisions, and this group includes many decisions which appear vital to attaining some measure of distributive justice for women. Dworkin does argue that

*people have a right, against this type of collective justification, that certain sources or types of preferences or choices not be allowed to count in that way. It insists that preferences that are rooted in some form of prejudice against one group can never count in favor of a policy that includes the disadvantage of that group.*⁷⁰

This clearly prohibits policy decisions which disadvantage women and which can only be justified on the basis of communal attitudes arising out of prejudice or stereotype. It does not, however, seem to go beyond this and insist upon positive programs designed to ameliorate a social and legal history of profound disadvantage.

Attempts to justify the social welfare state depend fundamentally upon the assumption that a coherent distinction can be made between disadvantages which arise from the circumstances of the individual and for which he or she has no personal responsibility and those which reflect individual choice. It appears in many different guises, in Dworkin's distinction between a person and his circumstances which '*assigns his tastes and ambitions to his person and his physical and mental powers to his circumstances*' and even more significantly in the argument that the distribution of resources must be ambition-sensitive, must reflect the cost or benefit to others of the choices people make, but not endowment-sensitive, in that it must not reflect differences of ability as between people with similar ambitions. A similar logic is at work in Rawls' emphasis upon the need to compensate for differences which are arbitrary from a moral point of view.⁷¹ What is, perhaps, not quite fully understood is the

⁷⁰ Dworkin, *Law's Empire*, *loc. cit.*, 386. For a full discussion of the critical tools equality of resources makes available for such distinctions, see Ch. 11. I believe that Dworkin's current distinction is much more narrowly drawn than the distinction between personal and external preferences.

⁷¹ The quoted passage may be found in Dworkin, 'Equality of Resources', *loc. cit.*, 302, the distinction between an ambition-sensitive distribution and an endowment-sensitive distribution at pp. 311-314. Rawls develops the idea that natural advantages and the advantages bestowed by family wealth and tradition are morally arbitrary in Rawls, *A Theory of Justice*, *loc. cit.*, 100-108. See also Rawls, 'The Priority of the Right and Ideas of the Good', *loc. cit.*, 257 n. 7 where Rawls suggests that leisure might be

relationship between these contemporary formulations and the traditional mind-body distinction. Our ambitions, our preferences, our choices are characterized as willed, as, at some level, conscious and rational decisions for which we ought to be accountable. Dworkin emphasizes this when he states that

*we want to develop a scheme of redistribution . . . that will neutralize the effects of differential talents, yet preserve the consequences of one person choosing an occupation, in response to his sense of what he wants to do with his life, that is more expensive for the community than the choice another makes.*⁷²

I have no quarrel with the moral point Dworkin is making. He is quite correct, individuals ought to be held accountable for the consequences to the community of their freely willed decisions. While I question the degree to which it is proper to describe many of our choices as freely willed, and would argue that certain significant life-choices and decisions are at least as significantly a by-product of our gender roles, I do not dispute the emphasis upon moral responsibility. This description seems utterly inadequate, even bizarre, when we consider the occupational choice made by a woman who chooses devote a period of eight or ten years to nurturing children and to domestic labour. Is this, somehow, a more expensive choice than others she might have made? Certainly, from her perspective, particularly if her marriage fails, the costs are immense. In the long run, through increased social welfare costs, etc., her choice may well be vastly more expensive for the community as a whole. It may even be that, when we consider the resources expended upon education and training, her failure to utilise her education and training to its full imposes a significant cost when communal underutilisation of human resources is considered. On the other hand, the work she has done may well be more valuable than that done by Wilt Chamberlain - to use Nozick's famous example. The problem seems to be, not that the work she actually has done is not valuable, but that the structure of equality of resources has difficulty in capturing its value. It may well adequately account for the 'value' of the services provided by movie stars, star basketball players, and captains of industry, but it cannot begin to account for the 'value' of those services which have been provided 'costlessly' within the confines of the household, in part because it relies upon a competitive market in which the interaction of the preferences of the entire community determines the true cost of goods and services. This, in turn, becomes both critical and problematical when we recognize that this particular difficulty in assigning value is inextricably linked with our social construction of gender and gender roles, with deeply embedded cultural traditions which have shaped and continue to shape the preferences expressed. If those traditions and norms themselves situate men and women very differently, and that difference is productive of profound disadvantage, we must confront the possibility that the preferences flowing from them are inadmissible in an egalitarian context,

included among the primary goods, and that the extra leisure enjoyed by those who choose not to work would disentitle them to support from public funds.

fundamentally corrupt, a conclusion which ultimately calls into question many, perhaps most of the preferences held by individuals.

A further difficulty arises from the ambiguity of the account provided. Dworkin is clearly addressing goods and services offered within the institutional framework of a competitive economic market. There is no market in the ordinary sense for services provided within the home in the context of an ongoing relationship, indeed, Dworkin's account of associative obligations seemingly renders treating such (ideally mutual) decisions as childbearing, childrearing and the allocation of domestic responsibilities as in any way contractual irrational. Neither alternative suppliers nor alternative purchasers are readily available, and, perhaps as a consequence, bargaining becomes profoundly difficult, often illusory. One issue which becomes critical in this context concerns the role of bargaining in establishing a 'true community' and the place of bargaining within such a community.⁷³ The last paragraph emphasized the 'costs' involved in the domestic role, both on a personal and communal level. This is not, however, the only interpretation available within the framework of equality of resources. If focus shifts to those women who have chosen dual careers, who are committed to workforce participation and also bear and rear children, this as well might, from a quite different perspective be characterized as a 'more expensive choice'. It may be that dual commitments can also be characterized as more expensive choices in the sense that workplace efficiency may be compromised, that communal provision for dependents, including children, the disabled and the aged, becomes essential, and that the home environment may be less palatable, particularly where domestic servicing remains the responsibility of the woman. That choice as well might, on this interpretation, be characterized as one which is more expensive for the community.

Even Dworkin's attempted distinction between 'endowments' and the choices in utilizing these talents conceals far more than it reveals. Our 'endowments', the bundle of talents and abilities each individual possesses, reflect, at least for Dworkin, not our choices but our physical beings, our personal resources. Despite this, Dworkin himself acknowledges that talents and ambitions are reciprocal, our ambitions depending significantly upon our perceived talents, and our realized talents depending to some extent upon our ambitions⁷⁴, but addresses only tangentially an issue which seems even more fundamental. The conception of a talent is a social conception, a bundle of developed and structured capabilities which is valued by a

73 Dworkin is at pains to deny that associative community is, in any sense, contractual, indeed, in discussing friendship he specifically notes that if the reciprocity between community members becomes too specific and concrete, if the precise nature of the obligations between friends ceases to be an open question and a matter of interpretation *'friendship would be possible only between people who shared a detailed conception of friendship and would become automatically more contractual and deliberative than it is. . .'* *Law's Empire*, loc. cit., 198. See Ch. 6 for further arguments concerning this issue.

74 *Ibid.*, 313.

particular community at a particular point in its history. Talents do not exist in the abstract. The real question is whether the 'talents' presently rewarded by our acknowledgedly imperfect market ought to be rewarded in the ways in which they presently are, or whether other talents and potentialities which are presently devalued ought to be recognized and rewarded to a much more substantial extent than present preferences would allow. Dworkin's closest approach to this quite different issue occurs when he notes in discussing cases where the envy test seems not to be met that

*the desires and needs of other people provide Adrian but not Claude with a satisfying occupation, and Adrian has more money than Claude can have. Perhaps nothing that can be done, by way of political structure or distribution, to erase these differences and remove the envy entirely.[sic] We cannot, for example, alter the tastes of other people by electrical means so as to make them value what Claude can produce more and what Adrian can produce less.*⁷⁵

The formula used by Dworkin suggests that the preferences which interact to yield the 'true' value of goods and services ought not be disturbed without some argument, form unspecified, which is independent of any given individual's relative position. We must maintain an agnostic stance with regard to the outcome of the interaction of community preferences unless this can be done. As he notes, the '*immigrants chose an auction, sensitive to what people in fact wanted for their lives, as their primary engine for achieving equality*' because any other alternative might demand that changes with unforeseeable consequences be set in train.⁷⁶ Dworkin notes that any social decision to alter the financial rewards available to the movie star might well alter the entertainment available to the entire community, thus disadvantaging those who prefer the fare now available. Equally, such changes are unpredictable and multidimensional,

*affect the prices and scarcity of different goods and opportunities that members of any particular class . . . will value very differently from one another.*⁷⁷

All such decisions are likely to generate profound changes in relative economic positions, changes which are both unpredictable and likely to produce unforeseen consequences for others. This does not, of course, prohibit such alterations out of hand, but any arguments made must not depend upon the particular position of any individual. The social and economic disadvantages with which I am concerned, which seem consequential upon the rhetorical glorification of the role of wife-and-mother and the profound economic and social devaluation of this same role, are implicated in a fundamental way in the structure of existing social, economic and political institutions. Any change would demand that we reimagine our

75 *Ibid.*, 308.

76 *Ibid.*, 330-331.

77 *Ibid.*

existing institutions, and reject much of our cultural and legal history as unworthy, as a consequence of attitudes which are, in and of themselves profoundly inegalitarian. This, in itself, as Dworkin emphasizes, is not sufficient to prohibit such changes, but arguments supporting them must be sustainable quite apart from any evidence concerning the relative disadvantage of particular individuals, unless their disadvantage stems from prejudice or other inegalitarian attitudes.⁷⁸

Attempting to think about such changes within the constraints of a market model seems arational, because the point of employing a market model lies in its capacity to accommodate the interaction of existing preferences and the division made between commercial and non-commercial activities. This is its strength and the reason it appeals to egalitarian liberals. Effectively, the market exists simply to facilitate the satisfaction of our preferences. Labour within the family is excluded from the marketplace by entrenched cultural and religious traditions, and the logic behind that exclusion reflects both our sense of what a market is and what it measures and our perception of what a family is. Are cultural attitudes such as these simply the concrete expression of deeply rooted prejudices, or is something else at work? Surely part of the appeal of the market model is the privileged place it accords competition, our sense that it rewards/ought to reward performance. One problem with extending a market model to the family is an equally strong sense that (whatever may have gone on in the 'marriage market' prior to the formation of a new family) family members ought to be pulling together, not competing. Equally, part of the appeal of the idea of market rewards for talent is the idea that more productive individuals ought to be rewarded for their productivity, that we can compare them because on some level they are competing with one another. Wilt Chamberlain has amassed his wealth because people are willing to utilize more resources to see him play basketball than they are willing to utilize to see other players. Nothing remotely like this occurs/is likely to occur with respect to household labour. The problem is not that work done within the home cannot be assigned an economic value, derived from the value of commercial analogues. Rather it is that a profound cultural antipathy exists

towards equating homemaking services with commercial analogues.⁷⁹ Our social practices, those Dworkin desires at least in part to affirm, deny that this connection is tenable.

Issues such as those raised in the paragraphs above emphasize the critical importance of the public/private distinction. Dworkin's account of equality of resources is designed to show what an egalitarian distribution would be like if decision making depended solely upon the resources available and individual preferences for their utilisation. In the real world, of course, decisions are more complex. There choices are more often based upon our relationships with others, upon our attitudes, and upon obligations and responsibilities which seem not to figure in Dworkin's hypothetical. Thus, we need to ask whether the auction itself anticipates these sources of distortion and attempts to ensure that they do not corrupt the outcome which follows or whether adjusting for externalities such as these is wholly a second order task. Dworkin specifies that even on the ideal theory level a number of constraints must be implemented if the auction is to measure true opportunity costs. First, all resources must be offered in as undifferentiated a form as possible to ensure maximum flexibility and respect for individual plans. Second, no constraints can be allowed which can be justified only upon grounds of religion or personal morality. Third, constraints upon freedom of choice may be

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The problems involved are highlighted by the efforts of courts to find a workable formula for damages for injuries impairing the capacity of a wife to perform domestic services in jurisdictions such as England and N.S.W. where the husband's common law action for loss of consortium has been abrogated by statute. Trindade & Cane note with respect to the action for loss of consortium, an action available only to the husband save in South Australia where S. 33 of the *Wrongs Act* 1936-75 extends it to the wife, that the action reflects the traditional legal perception that the husband had a proprietary interest in his wife and that the action is explicitly for the 'loss of housewifely services and society.' See F.A. Trindade & P. Cane, *The Law of Torts in Australia*, Melbourne, Oxford Univ. Press, 1985, 405. The difficulties with the new approach, one which centres upon the loss of a capacity in the victim, are evident in the conflicting decisions. In *Griffiths v Kirkmeyer* [1977] C.L.R. 161 Gibbs J. noted at 168-9 that a two stage inquiry was needed. The court must consider both whether the services were reasonably necessary, that is whether their loss would necessitate their replacement at a cost were they not gratuitously provided by family members, and second, 'is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer?' Subsequently, the N.S.W. Court of Appeal in *Burnicle v Cutelli* [1982] N.S.W.L.R. 26 held that the commercial value of the services once provided by the plaintiff and now provided by other members of her family could not be recovered, Glass J. dissenting; while the Federal Court of Australia held in *Hodges v Frost* (1984) 53 A.L.R. 373 that such compensation was proper where the need went beyond minor rearrangements. Kirby J., delivering the judgment of the Court, explicitly noted that it was impossible to disentangle those services referable solely to the husband's needs from those which benefited the household as a whole. See p. 391. Similarly, Allan has noted that household labour is structurally differentiated from paid work in precisely the three characteristics which signify 'real' productive work. Within the household the distribution of material rewards is divorced from the wage form, no clear boundaries of space and time exist between work and non-work, and work is not fully socialized in that it need not be coordinated with the work activities of others. See Allan, *loc. cit.*, 32. Dworkin apparently shares this antipathy. See Ch. 6 for a discussion of the difficulties which arise when we attempt to integrate equality of resources, which pushes us inexorably towards a contractual account of marriage, and associative obligations, which attempts to escape the contractual paradigm.

implemented to correct for externalities in a way which attempts to even out the windfalls which result. Fourth, a principle of authenticity would ensure that individuals had the maximum possible freedom to

*engage in activities crucial to forming and reviewing the convictions, commitments, associations, projects, and tastes they bring to the auction, and after the auction, to the various decisions about production and trade that will reform and redistribute their initial holdings.*⁸⁰

Finally, the principle of independence would rule out any baseline constraints which could only be justified upon the grounds of prejudice and would put in place systematic constraints designed to place the victims of prejudice in the position they would occupy if prejudice did not exist.⁸¹ In Chapter 11 I argue for one possible constraint, a stipulation that an egalitarian distribution would treat responsibility for necessary household labour and parenting as equally shared and would assume that individuals exercised their preferences in respect of the appropriate balance of work, leisure and consumption against this baseline constraint.

THE CHANGED ROLES OF FAMILY AND STATE

The bureaucratic social welfare state of egalitarian theory has in significant respects upended the classical relationship between the family and the state. It has usurped to an increasing extent the traditional roles of the household, at least as these were perceived in classical theories, and undertaken to meet the economic and social needs of citizens. Traditionally, the household was the basic economic unit, had virtually exclusive responsibility for the socialization and education of children, provided basic medical care, and care for the disabled and the aged. Today, the household is no longer a productive unit, but consumes goods and services produced elsewhere, and has lost much of its responsibility for the education of children. Its roles in the provision of medical care and support services for the disabled and aged are gradually being displaced. The social welfare state as family ought to treat its citizens as equals, enact schemes of education to mitigate the discontent which arises from the differential rewards accruing from market competition and employ redistributive taxation to mitigate the financial disadvantages of competition. Our rationality is to be expressed through the exercise of preferences in the marketplace, the family, the political sphere. As citizens we are autonomous, and must be treated with equal concern. As private individuals, we remain free to reject autonomy and independence, seek alternate avenues to personal fulfilment. One of the reasons egalitarian theories seem unable to come to grips with inequalities which seem to arise not from lack of talents or background opportunities or even overt prejudice but from social patterns and roles which are believed to be naturally ordained

⁸⁰ Dworkin, 'The Place of Liberty', *loc. cit.*, 35.

⁸¹ Dworkin discusses the various baseline constraints essential to ensure that the auction reflects true opportunity costs *ibid.* 25-37. See also the detailed exploration of these concepts in Ch. 11.

is precisely that agnostic stance. While attempting to both liberate us from the necessity to adhere to any particular tradition and set of traditional lifeways and ensure that our own views of the good life remain open to revision, it has also diminished our capability to recognize that our lives ought to be lived as wholes, that what transpires in the family sets bounds to what can transpire in the market and in the city, just as the events of the market and the city constrain the possibilities within the family. Once reason and evaluation have become private, we have the paradoxical position that the state assumes responsibility for our bodies, but our minds are left to the mercies of the smaller communities and associations to which we owe our primary loyalties. This point has been particularly well made by MacIntyre. He comments that the

*liberal claim was to provide a political, legal, and economic framework in which assent to one and the same set of rationally justifiable principles would enable those who espouse widely different and incompatible conceptions of the good life for human beings to live together peaceably within the same society, enjoying the same political status and engaging in the same economic relationships.*⁸²

In the public arena, all that may be permitted is the expression of preferences, and it is for this reason that the ability to bargain has become crucial.⁸³ MacIntyre notes that to be a liberal is to be committed to the belief that there can be no overriding good, but rather only a range of goods pursued in compartmentalized spheres - political, economic, familial, artistic, athletic, scientific - the list is MacIntyre's. Rawls' attempt to define and defend a political conception of justice and his insistence that his account concerns the public institutional structure of society epitomizes this compartmentalization.⁸⁴ The critical point, then, is that

the liberal self is one that moves from sphere to sphere, compartmentalizing its attitudes. The claims of any one sphere to attention or to resources are once again to be determined by the summing of individual preferences and by bargaining.

The critical importance of communally acceptable rules for bargaining becomes obvious, epitomized by Rawls' emphasis upon 'free public reason', guidelines for public inquiry and rules for assessing evidence based upon common sense and the (non-controversial)

82 A. MacIntyre, *Whose Justice? Which Rationality?*, Notre Dame, Univ. of Notre Dame Press, 1988, 335-336.

83 Cf. Dworkin's discussion of choice-sensitive issues in both 'The Place of Liberty' and 'Political Equality', *loc. cit.* Dworkin's account emphasizes the importance of accuracy in deciding choice-sensitive issues, and most particularly, the need to ensure that bargaining is not distorted.

84 See Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 173 ff. for an account of the difficulty of interpersonal comparisons in questions of justice and, in particular his comment that, 'in a democratic society, then, the one good must be conceived as subjective, as the satisfaction of desire or preferences' at p. 182.

procedures and methods of science.⁸⁵ Similarly, Dworkin devotes much of his recent work on equality of resources to attempting to establish appropriate ground rules or constraints upon bargaining in what he terms choice-sensitive issues.⁸⁶ MacIntyre is right, and right in a way which reveals a great deal about the underlying reasons for the reluctance of liberal theorists to consider the inequality of women and the concrete social reasons for their inequality. If women are to be considered two options seem available. Either egalitarian ideals must be implemented sphere by sphere, and inegalitarian preferences deemed illegitimate in every sphere, or the prevailing compartmentalization must be broken down. Either way we ultimately collapse the distinction between public and private. The real difference is one of method, not outcome, and in Chapter 6 I endeavour to apply the former method to Dworkin's theory and the latter to that of Rawls. Whether we attempt to define the demands of equality sphere by sphere or whether we acknowledge that the demands of equality apply equally to every sphere we must confront the fact that what happens in the home constructs the range of possibilities which the market and political society can make available, that the wares purveyed in the marketplace at least partially construct the ways in which individual men and women may be perceived, and therefore, the possibilities open to them in other areas. No normal individual is capable of living by one set of values within the family, by another within the marketplace, and by yet another within the political community. The bottom line must be the same for each. Likewise, because we form one community, because our practical choices and decisions, our ways of life, shape the practical texture and fabric of that community and the life forms possible within it, decisions ought to be taken in full knowledge of that fact and that demands the evaluation of both means and ends. Doing that mandates the exercise not merely of instrumental rationality, the selection of appropriate means given our ends, but practical reasonableness, the conscious discrimination between possible ends by reference to our collective judgment concerning the sort of community we hope to become, and risks ruling many preferences out of order, destructive of our lives in common. In order to do that, we must first acknowledge that we have lives in common, in community with one another, and that we must accept responsibility for the community which we construct, not simply in terms of the principles it espouses but in terms of the ends which may be pursued within it. As MacIntyre correctly notes, the real power in any liberal order lies, not with those who express preferences, whether in the home or in the market, but with those who determine the alternatives available and the ways in which those alternatives are presented.⁸⁷

85 Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.*, 20. A very similar theoretical approach forms the basis for Dworkin's distinction between choice-sensitive and choice-insensitive issues discussed earlier in this chapter.

86 Dworkin, 'Political Equality', *loc. cit.*

87 MacIntyre, *loc. cit.*, 337. More generally, for supporting arguments see *ibid.*, Ch. 17, 326 ff. and note MacIntyre's perspicacious comments upon the connection between the role given preferences and the nature of power in the liberal order at p. 345.

A PUBLIC ETHIC OF CARE AND RESPONSIBILITY: THE GOOD OF SOCIAL UNION

As we saw in the last section, the underlying logic of egalitarian liberalism is clear. The provision of welfare rights, of judicial and political protection for those whose incapacities place them at a disadvantage in the marketplace, address the needs and infirmities of biological man. The provision of economic and social resources is aimed at meeting basic biological and social needs, needs which arise because people are both social and animals. Equally, protection for those who are unable to defend and protect their own interests in competition for goods and resources addresses facts about people as natural and biological beings. The justification offered by Rawls is that only if these needs are socially met will individuals be able to realize the fundamental benefits of political and civil rights and liberties. The social structure ought to be ordered in a way which will enable all citizens to realize the worth of basic modern political guarantees. In many ways, this is very similar to the tone and structure of Greek theories - that these benefits are essential if man is to realize himself as a citizen, a man who is fully of the city. Effectively, having sought to develop a framework which acknowledges that all within the community are entitled to take their places as citizens, Rawls argues that fundamental social needs must be met if man is to realize himself as a moral person. He argues that the primary goods⁸⁸ ought to be interpreted as those '*things generally required, or needed, by citizens as free and equal moral persons*' and emphasizes that needs differ from '*desires, wishes and likings*'. Needs are objective in a way in which desires are not.⁸⁹ Without adequate access to these goods the social background conditions and means essential if individuals are to pursue other, more personal ends are lacking. Rawls emphasizes that '*the principles of justice view citizens as responsible for their ends*'⁹⁰ and presume that, given a fair share of these goods, citizens have the capacity to adapt their own conceptions of the good to their anticipated collection of these goods and moderate the claims they make on social institutions.⁹¹ Rawls argues that although political liberalism denies the possibility of one overriding good, '*while justice draws the limit, the good shows the point*'.⁹² Thus, although the forms of life which may be realized within a well-ordered society are necessarily limited by the priority of the right, '*a political conception of justice must leave adequate room for forms of*

88 The primary goods include the basic liberties, freedom of movement and free choice of occupation against a background of diverse opportunities, powers and prerogatives of offices and responsibilities, income and wealth, and the social bases of self-respect. See Ch. 2 for a full account of the primary goods and the reasons for their choice. The list and the discussion in that chapter are taken from Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 168.

89 *Ibid.*, 172.

90 *Ibid.*, 169.

91 *Ibid.*, 171-172.

92 Rawls, 'The Priority of the Right and Ideas of the Good', *loc. cit.*, 252.

life citizens can affirm'.⁹³ In addition, and significantly, Rawls argues that a well-ordered community governed by the principles of justice possesses distinctive values of its own, '*the virtues of fair social cooperation such as civility and tolerance, reasonableness and the sense of fairness*'.⁹⁴ Thus he argues that a well-ordered society is good in two distinctive ways. First, it is good for individual human beings in that it permits them to exercise the moral powers and secures to them justice and the social bases of mutual self-respect. Second, whenever a shared final end emerges a social good is realized through the cooperation and joint activity of citizens who recognize that they depend upon the cooperation of others.⁹⁵ While emphasizing that even conceptions of the good which are compatible with the basic structure may be unable to endure in a well-ordered society and that fact is cause for regret and for a sense of loss⁹⁶, he also emphasizes that no social world is without loss.

Several features of Rawls' structure are significant. First, he couches his account in representative form. The principles of justice affirmed are those which would be chosen by rational and indistinguishable representatives, representatives Rawls suggests ought to think of themselves as heads of family lines.⁹⁷ Whilst Rawls intends this to suggest the intergenerational aspects of justice, and in particular, the responsibility of those deliberating the form and content of a just social order to consider those who will follow after them, the allusion is disquieting. In our culture, one which, until about the turn of the century, was patriarchal⁹⁸ in legal form, social and family structures, and political attitudes, the image employed suggests an agreement among male heads of families to regulate competition among themselves for mutual benefit and for the benefit of their descendants. Conventionally, although this is gradually changing, women are expected/required to assume the name of their husband upon marriage. Cultural conventions dictate that children (other than those born

93 *Ibid.*

94 *Ibid.*, 263.

95 *Ibid.*, 270-271.

96 Given the context it may be that Rawls is acknowledging that the traditional lifeways of communities such as the Amish or Shakers and those of indigenous peoples are unlikely to survive in a well-ordered community, even if those lifeways appear compatible with justice.

97 In Rawls, 'Justice as Fairness', *loc. cit.*, 236-239 Rawls discusses and defends his use of the original position as a device of representation. The suggestion that we ought to view ourselves as 'heads of family lines' may be found in Rawls, *A Theory of Justice*, *loc. cit.*, 128, and is expanded upon and elaborated at p. 292. While Rawls emphasizes that it is not necessary for us to think of ourselves as heads of family lines to attain the perspective needed to address questions of intergenerational justice, he notes that, in general, he prefers to follow this interpretation.

98 By this I mean simply that men exercised power within the political structure, within the economic structure, and within the family and that power in all three spheres was effectively reserved for men.

outside legal marriage) assume the name of the male parent.⁹⁹ In a real sense, head of the family signifies male head, precisely because the family is gendered and the woman/family link hidden. It has been suggested the 'families' referred to on a theoretical level are not families at all. '*Rather they are almost invariably the wives, mothers and sisters of such families . . .*'¹⁰⁰ What is lost in the usage of the term family is the significance of the family designation, the degree to which an expression such as heads or representatives of family lines signifies not only intergenerational continuity mediated by ties of sentiment but also a particular relationship between the public person or head and the woman/family unit whose interests are thereby served. Certainly this image is explicitly supported by Rawls' acknowledgment that the principles appropriate to political society may be inapplicable on the micro level. Within political society, justice is first among virtues.¹⁰¹ Within the smaller groups and structures of which political society is composed, justice is not only not first among virtues, but not necessarily a virtue at all. On the macro level, the state ought to be constituted by rational principles subject to the constraints of reasonableness. On the micro level affection and altruism predominate.¹⁰² These virtues, the one appropriate to the city, the other appropriate to the household, seem mutually exclusive and on one level this is undeniably appropriate. Few would wish to see any return to political nepotism and its attendant social evils. On another level, however, given Rawls' conception of individuals as free and equal moral persons, it may well be that unless justice is installed as the first virtue of all human associations, the

99 The residual strength of such conventions has been illustrated in a series of cases concerning the surnames of children where the biological parents have been divorced. As recently as 1962 an English court held that only the father was competent to change the surname of an infant. See *Re T (otherwise H) (an infant)* [1962] 3 All E.R. 970. In one of the more recent Australian cases, whilst the mother was allowed to enrol the children in school under the name of their step-father, their legal name remained that of their natural father and this fact was required to be noted on all school records. See *Parkes v Parkes* (1982) F.L.C. 91-231. The present Australian position apparently is that, if the biological parents cannot agree, only the court is competent to effect a change of surname. Both parents are incompetent to act unilaterally by virtue of the presumption of joint custody and guardianship embedded in the *Family Law Act 1975*, leaving the underlying cultural convention tacitly in place.

100 See G. Allan, *loc. cit.*, 16.

101 While the limitation of Rawls' theory to the macro-structure of society was implicit throughout Rawls, *A Theory of Justice*, *loc. cit.*, it is much more explicit in Rawls, 'Justice as Fairness', *loc. cit.*, where Rawls explicitly states that his is a political theory merely, without application to wider metaphysical or ontological debates. Cf. the extended discussion on this point in Nozick, *loc. cit.*, 204-206.

102 This is particularly clear in recent writings where Rawls emphasizes the distinction between the political and the personal and familial, which, he notes, '*are affectional domains, again in ways which the political is not.*' Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 242. Rawls conceives of his view of the political as free standing and insists that his '*aim is to specify the special domain of the political in such a way that its main institutions can gain the support of an overlapping consensus.*'

other virtues believed characteristic of families and of other associations will become profoundly distorted, indeed may never flourish in any meaningful sense.

If Rawls endeavours, through the difference principle, to incorporate in attenuated form something of the affection and altruism characteristic of his ideal family into the distributive arrangements of the well-ordered state¹⁰³, he fails to acknowledge that for the needs which motivate the parties and lead them to develop the difference principle to be defensible as fundamental they must be relevant to every area of human social life. As is well known, Rawls argues that, under the conditions imposed by the original position, while individuals are unaware of their actual social positions and goals, they nonetheless identify certain basic social goods as fundamental. He argues further that rational individuals would prefer a greater rather than a lesser share of these goods, and thus would agree that the basic institutional structure of society ought to be arranged to secure to the least advantaged individuals the greatest possible share of these goods, given equal basic liberties and fair equality of opportunity. In recent writings, Rawls emphasizes that '*the primary goods are certain features of institutions or of the situation of citizens in relation to them*'.¹⁰⁴ These goods provide a basis for interpersonal comparison when dealing with questions of social justice. Rawls explicitly argues that the primary goods are relevant only in questions of justice dealing with the basic structure, and that their appropriateness in other circumstances is not to be assumed.¹⁰⁵ This apparently follows from his acknowledgment that

*they are not what, from within anyone's comprehensive doctrine, can be taken as ultimately important: they are not, in general, anyone's idea of the basic values of human life.*¹⁰⁶ [Rather, they are all-purpose means,] *necessary conditions for realising the powers of moral personality.*¹⁰⁷

Leaving Rawls' acknowledgment that these goods cannot be taken to embody fundamental human values aside for the moment, it remains essential to question his reluctance to suggest wider application. He states that the conception of a fair share of the primary goods is intended to specify those claims which individuals may legitimately make on

103 Rawls explicitly notes that '*the difference principle . . . does seem to correspond to a natural meaning of fraternity: namely to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off. The family, in its ideal conception and often in practice, is one place where the principle of maximizing the sum of advantages is rejected. Members of a family commonly do not wish to gain unless they can do so in ways that further the interests of the rest. Now wanting to act on the difference principle has precisely this consequence.*' Rawls, *A Theory of Justice*, loc. cit., 105.

104 Rawls, 'Social Unity and Primary Goods', loc. cit., 163.

105 *Ibid.*

106 Rawls, 'The Priority of the Right and Ideas of the Good', loc. cit., 258.

107 Rawls, 'Social Unity and Primary Goods', loc. cit., 166.

public social institutions. They represent, at the level of ideal theory, that which individuals and associations are entitled to expect. Rawls makes a further distinction in this context which is crucial. He argues that the public conception of justice includes a social division of responsibility. It follows that

*society, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework, while citizens (as individuals) and associations accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.*¹⁰⁸

As was made clear earlier in this chapter, I have no wish to dispute the status of these goods as needs, nor is it here appropriate to question the structure of the difference principle. Rather, my concern centres upon the compartmentalization inherent in offering a political conception of justice, and Rawls' consequential reluctance to extend the applicability of his account beyond the basic structure of political society. Surely among those associations responsible to adjust ends and aspirations in light of the expected means available are families, given that some form of family structure appears to be a universal in human cultures. Equally, of course, the earliest and most persistent social division of labour is biologically based, specifically that between men and women. Given that, and given Rawls' acknowledgment that the social division of labour in the general sense must continue to exist, and his explicit statement that it is impossible that, even in a well-ordered society, *'everyone might fully realize his powers and that some at least can become complete exemplars of humanity'*¹⁰⁹, it follows that justice within such associations is critical. While, in extant, relatively unjust societies such as our own, the biological division of labour¹¹⁰ and the economic division of labour¹¹¹ together provide diminished access for women to at least two, and more probably three, of the five general categories of primary goods,¹¹² it does not follow that these social practices may

108 *Ibid.*, 170. N.B. the strong parallel with Dworkin's account of the division between public and private responsibility, *Law's Empire*, *loc. cit.*, 295-312, and the intimate connection between what Dworkin identifies as the community personified and Rawls' reference to the citizens as a collective body.

109 Rawls, *A Theory of Justice*, 529.

110 Women are both biologically responsible for child bearing and socially responsible for child rearing and other forms of domestic labour.

111 Occupations socially coded female as a group provide diminished economic returns and opportunities to develop and exercise leadership skills as well as limited opportunities for advancement.

112 Women as a group have disproportionately limited access to the powers and prerogatives of offices and positions of responsibility and to individual access to income and wealth. Concerning whether this comparative disadvantage carries over to the social bases of self-respect raises a more difficult issue, however the respect and

be called just. Given the fact of the (universal) social division of labour, and given that within many families this continues to dictate that the husband is either the sole or the primary breadwinner while the wife accepts primary responsibility for domestic labour, the need for a just distribution theoretically resolved within public institutions reappears.

At this juncture, it becomes essential to consider Rawls' account of the information available to the parties in the original position. Rawls argues that not only do the parties not know particular facts about themselves such as their place in society, their natural abilities and so on, but also they are unaware of the particular circumstances of their own society including its economic or political situation. They are, however, presumed to know general facts about human society including an understanding of

*political affairs and the principles of economic theory . . . the basis of social organization and the laws of human psychology . . . [together with] whatever general facts affect the choice of the principles of justice.*¹¹³

It apparently follows from this that information concerning specific social forms particular to advanced industrial societies such as the radical separation of the sphere of production and the sphere of consumption together with the destruction of the productive functions of the household would be unavailable to the parties. Likewise, culturally specific information concerning the gendered division of labour conventional in our society would be unavailable. General information such as the biological division of reproductive labour and the role of family groups in providing socialization and nurture for succeeding generations would be available as would basic scientific information concerning the prolonged neotony of the species and the probable effect of this fact upon human social structures. What follows from this? It seems to follow that behind the veil of ignorance the parties must be aware that human individuals live in families, although their form and membership is variable, that human children require regular care and supervision for a prolonged period, and that the allocation of the labour involved in the care and nurture of succeeding generations forms a fundamental part of the social division of labour, although the concrete forms this takes may vary. What is equally significant is that, given this general information, nothing in either Rawls' account of basic social needs¹¹⁴ or in the structure of the two principles of justice reflects this knowledge.

mutuality shown us by others is intimately associated with our leadership roles and our perceived status, and for that reason I would suggest that women are also comparatively disadvantaged in that respect. I should note also that in abusive relationships women are, not infrequently in social practice, if not theory, denied access to all the primary goods.

113 Rawls, *A Theory of Justice*, *loc. cit.*, 137. The basic knowledge available strongly suggests that they are adult members of an intellectual elite.

114 It would, after all, seem reasonable to suggest that the need for nurture, one which arises inevitably in childhood, and at other times in the normal life cycle, is fundamental. Indeed, in our culture this need is primarily provided by the monogamous family (read woman), which Rawls has identified as one component of the basic structure.

This relative inattention is the more remarkable because Rawls emphasizes that a critical part of the justification for the veil of ignorance is that as a consequence of this rigorous restriction on the information available in determining the principles of justice

*no one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage.*¹¹⁵

Surely, given the knowledge reasonably available to the parties, and given that the parties do not know their places in the social division of labour, including the labour involved in nurturing succeeding generations, they would wish to ensure that the socially necessary labour involved did not affect in any way their entitlement to a fair share of the benefits of cooperation. That is, an individual who was unaware whether or not he or she would bear responsibility for the primary care of a succeeding generation, but knew that a very large number of persons in each generation would have such responsibility, would wish to ensure that this would be irrelevant to his or her entitlement to a fair share of the benefits of cooperation, should it happen that such responsibility was his or hers. A relatively simple means for ensuring this would be to insist that the requirements of justice form a minimum standard for the conduct of social life generally rather than being restricted to the public institutional structure of society.¹¹⁶ If access to the basic goods is a prerequisite for the full development of the social bases of self-respect Rawls suggests are critical to moral personality and provide the support necessary for the individual to participate with zest and confidence in the activities of social cooperation, and if, as Rawls states, '*only in the activities of social union can the individual be complete*',¹¹⁷ they must be relevant to all the various aspects of the individual life and to all the stages of the individual life cycle. Needs do not cease to be needs because discourse concerns the family rather than the city. When discourse is constricted in the way Rawls suggests, not only does justice forfeit much of its conceptual force, the concept of needs, and, in particular, Rawls' attempt to give his account of basic social needs objective status, becomes unpersuasive. The structural advantages of deeming these needs, rather than mere desires or preferences, lie in their foundational status, in the fact that Rawls presents them as the foundation which is necessary if we are to pursue our private ends, whatever those may happen to be. They represent the background conditions essential if the social bases of self-respect are to develop, and self-respect surely is a precondition for any meaningful form of social life.

115 *Ibid.*, 139.

116 An alternative approach, one which suggests that it may be appropriate to characterize women, or certain sub-groups of women, as the least advantaged group will be canvassed in Ch. 11, as will the effect of incorporating recognition at the theoretical level that responsibilities in respect of subsequent generations ought be equally shared as one of the burdens of social cooperation. See Ch. 6.

117 Rawls, 'The Basic Liberties and Their Priority', *loc. cit.*, 36.

In many ways, Rawls' attempt to offer a specifically political conception of man and of justice appears Greek in character. By attempting to identify the virtues essential to citizenship and the material conditions essential if these virtues are to flower, and by disclaiming all foundational epistemological and ontological assumptions Rawls seeks to retain the undoubted theoretical advantages of a determinate conception of human nature without the traditional disadvantages, including the demand for an empirical foundation. Justice both retains its position as first among virtues and seems ultimately less a moral stance than a regulatory mechanism to secure to all the benefits of social cooperation precisely because of Rawls' insistence that he offers an account of political justice merely. Whilst Rawls places great emphasis upon the fact that his account of men as free and equal moral persons is a specifically political conception, and that the forms of moral character and moral virtues affirmed characterize the

*ideal of a good citizen of a democratic state - a role specified by its political institutions [he also emphasizes] that the political virtues must be distinguished from the virtues that characterize ways of life belonging to comprehensive religious and philosophical doctrines, as well as from the virtues falling under various associational ideals . . . and those appropriate to roles in family life and to the relations between individuals.*¹¹⁸

Yet, given the critical importance to all forms of egalitarian social life of such virtues as civility and tolerance, reasonableness and a sense of fairness, and given the inherent appeal of a conception of human beings generally as free and equal moral persons capable of cooperating with others over an entire life, it remains difficult to understand why these undeniably important virtues ought not be acknowledged as fundamental principles applicable to all forms of social organization. Certainly, I can think of no better foundation for family life than those virtues and that understanding of ourselves as persons. While, undeniably, there ought be much more to family life than these virtues suggest, without such a foundation, understood and affirmed by all, there is likely to be very much less, perhaps nothing at all worth preserving. It is this reluctance to affirm a wider basis, indeed, abandonment of the hope that a wider basis can be found, given what Rawls terms the social fact of pluralism, which leads me to conclude that despite Rawls' sustained attempt to demonstrate the existence of distinctively political goods, his attempt to establish that his overlapping consensus is not a mere *modus vivendi* fails.

Just as the instrumental state has replaced the *polis*, an instrumental view of private relationships increasingly predominates over an ethical view. Political relationships and political justice exist, not because these are profoundly worthy goods in and of themselves, but because they secure the socially cooperative relationships essential if men and smaller communities are to pursue their own ends. So too with the family. The exclusion of family

relationships from the relationships and requirements of civil society explicit in early liberalism has become axiomatic in Rawls. Seemingly, and perhaps as a necessary consequence, all such relationships are among those conceptions of the good we are at liberty to decide upon and to revise in accord with our plans of life. When this is combined with the blanket of privacy with which family relationships are conventionally shrouded, and which Rawls apparently has no wish to disturb, the ultimate effect is that the state dictates the terms of birth of the legal family and signs its death certificate while simultaneously attempting to deny that issues of justice arise within its domain. Certainly, in Rawls' only direct references to the political significance of family groups, while he acknowledges that the family is a barrier to attaining fair equality of opportunity, he also notes that he does not believe this to be significant so long as justice obtains between family groups.¹¹⁹ In that, perhaps, he may be thought to give away too much, to betray his own best instincts. Surely the abolition of families on the one hand and reconciliation to the (unalterable?) conditions of human life on the other are not the only alternatives. We might, after all, strive to realize just families as well as justice among them, indeed might recognize that unless we can secure justice within families it is profoundly unlikely that we will attain just institutions within the wider community. It is, after all, within our families that we *become* free and equal moral persons, if, indeed, we ever do.

Perhaps of equal concern is the fact that the interests given credence in his structure are clearly those of adult individuals who perceive themselves to be independent. While their role as representatives suggests that they may be responsible for others, that is, have others who depend upon them, they themselves are fully independent and attempt to secure for themselves a fair share of social goods and resources in part at least to enable themselves to remain so. They are individuals whose needs *qua citizens* can be met by the provision of certain goods, and, by implication, are competent to secure whatever other goods they may

119 Rawls, *A Theory of Justice*, *loc. cit.* 74, and esp. 511-12. In acknowledging that the family may be a barrier to attaining equality of fair opportunity, Rawls emphasizes the variation between families in terms of social and moral training and the inevitable influence of these upon motivation and the development of natural aptitudes. He does not, however, acknowledge the role of gender and, perhaps, other forms of preferential treatment in modelling the aspirations and ambitions of individuals, even within the same family. Rawls observes at pp. 511-12 that while the idea of equal opportunity suggests the need to abolish the family, '*within the context of the theory of justice as a whole, there is much less urgency to take this course. . . . [W]hen the principles of fraternity and redress are allowed their appropriate weight, the natural distribution of assets and the contingencies of social circumstances can more easily be accepted. We are more ready to dwell upon our good fortune now that these differences are made to work to our advantage, rather than to be downcast by how much better off we might be had we had an equal chance along with others if only all social barriers had been removed. The conception of justice . . . seems more likely than its rivals . . . to reconcile us to the disposition of the natural order and the conditions of human life.*' Rawls, it seems to me, gives away far too much in these passages, particularly in seeing the only alternatives as abolition and acceptance. To reform the family, to encourage the realization of just families as a basis for a just social order, seems a reasonable (and rational) alternative (in his sense of those words) to both abolition and resigned acceptance.

require for a full life unaided. What, one might ask, of those who cannot? Is justice not due them as well? Are they not also citizens, entitled to a fair share of basic social goods including the good of the social bases of self-respect?¹²⁰

THE ROLE OF THE PUBLIC/PRIVATE DISTINCTION IN CONTEMPORARY THEORY

We have, in looking at the theories of both Rawls and Dworkin, recognized that both assume, essentially without argument, a fundamental distinction between the public and private spheres. Both argue for public responsibility, for redistribution to ensure that all (adult) individuals have adequate resources to meet their needs and to participate fully in their community. Both simultaneously argue for private freedom, for a sphere of life, epitomized by the family, in which individual choices and decisions depend solely upon the preferences of the individual. Yet, not only does the foundation for the distinction between public and private become elusive once political structures are committed to meeting basic social needs, but also we are forced to confront the social fact that, even within the family, the freedom of one 'free and equal moral person' may involve the denial of that freedom to one or more others. It becomes necessary to re-evaluate what this distinction signifies in our culture, explore what we seek to protect by this division and whether it is worthy of protection. In Greek theory, as we saw, the division between public and private spheres was thought to mirror that between mind and body, between man realizing himself as a rational being and man satisfying various biological and emotional needs. The paradigm shift heralded by the emergence of liberal theories maintained the division between public and private intact, but explained it in very different terms. Ideas of human excellence had changed, as had the symbolic significance of rationality. Debate, public deliberation among equals and political action had diminished in importance. Classic liberal theorists such as Hobbes and Locke emphasized, not civic virtue, but contract and market competition. The equality sought was not the equality of citizens deliberating together to chart a course for their community, but that of market actors each seeking to satisfy his wants as efficiently as possible. The state existed to regulate competition within the marketplace and to protect property interests, thus contracting the role of politics. Man as a political animal was replaced by man as an economic animal. *His* nature was most fully realized in competitive relations within the market, in the exercise of instrumental rationality. The market, not the city, became the sphere of freedom. If the state was conceptualized as public, civil society including the market had become the sphere of private freedom. The household had gradually been stripped of its economic functions and reconceptualized as a site of leisure presided over by wife/mother. It stood outside both state

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This possibility is, of course, addressed by Rawls in his principle of paternalism. Rawls, *A Theory of Justice*, *loc. cit.*, 248-251. Curiously, Rawls, in his discussion of paternalism, fails totally to consider the possibility that nurture is a basic human need. See Ch. 6 for a comprehensive discussion of the principle of paternalism, and, in particular, an argument that, fully applied to, for example, family life and the education of children, it as well has the capacity to shatter the distinction between public and private.

and civil society, had become private in a new and different sense, present to the state and civil society only through its relationship to the male head of household.

The emergence of the modern social welfare state, and the development of egalitarian liberal ideologies signal yet another paradigm shift. Once public authorities engage in the provision of private needs, the state is authorized to assume many of the traditional functions of both the household and the marketplace. Specifically, the state meets needs, facilitates and regulates the distribution of goods and services, attempts to ensure that the allocation is fair. Nowhere is this collapse of the public - private distinction more marked than in the increasing assumption of responsibility by the state for the social and economic well-being of single parent families, particularly those headed by women.¹²¹ Effectively, with the disintegration of many traditional family and communal groups, the state is being compelled to assume financial (and, in some cases, moral and social) responsibility for the aged, for children, for women whose personal and employment backgrounds render them unable to compete in the marketplace.

A further difficulty arises because of the nature of egalitarian ideals. The move from formal equality to substantive equality, together with the collapse of the idea that the members of the smaller groups and associations within any community necessarily possess an identity of interests, so that the interests of any one individual may be equated with the interests of the group, has highlighted the importance of the work of theorists such as Rawls who postulate basic social goods as common interests of all citizens. He argues that because these basic interests are essential means to all more particular ends it is proper to view them as common to all citizens. He argues further that it follows that because a rational individual (one who seeks to further his own interests to the greatest extent possible) would prefer that he have more rather than less of these goods, individuals who are also reasonable and who realize that social cooperation is essential to the well being of all would recognize that they can only expect the willing cooperation of others upon terms which are fair to all. This account of fundamental interests, interests derived from, as Rawls emphasizes, a particular conception of the individual as a free and equal moral person emphasizes two powers,

*the capacity to honor fair terms of cooperation and thus to be reasonable [and the] capacity to form, to revise, and rationally pursue . . . a conception of what we regard for us as a worthwhile human life [and thus to be rational].*¹²²

Rawls argues that '*the primary goods are necessary conditions for realizing the moral powers*'¹²³ and emphasizes that their characterization does not rest upon historical or social fact. Hence,

¹²¹ *Women's Budget Statement 1989-90, loc. cit., 208.*

¹²² See generally Rawls, 'The Basic Liberties and Their Priority', *loc. cit.* The quotations may be found at p. 16.

¹²³ *Ibid.* 22.

the primary goods emphasize the basic liberties, freedom of movement and free choice of occupation, the powers and prerogatives of offices and positions of responsibility, income and wealth, and the social bases of self-respect.¹²⁴ The primary goods delineate those social and material conditions needed if individuals are to participate in *public* life with zest and confidence. Rawls fails to acknowledge as equally foundational those 'private goods', for example, care and nurture, essential if we are to become public persons and the effect their provision may have upon the access of some individuals to the primary goods. While he undoubtedly recognizes the importance of love and care in the development of the moral sentiments, and ultimately of a sense of justice,¹²⁵ his failure to analyse private social arrangements leads him to disregard the effect of family arrangements upon the access of individual family members to the goods he deems basic. We are here dealing with a political conception of the person rather than a wider moral conception. The primary goods reflect the interests of individuals who construe themselves as independent and see themselves as able to secure the cooperation of others upon fair terms, that is, terms which enable them to maintain their independence within cooperative public relationships based upon mutual respect. Yet, if the primary goods form the social and material base for just political relationships, relationships based upon cooperation and mutual respect, it is difficult to understand why Rawls is so reluctant to suggest a wider moral basis. Given that Rawls explicitly identifies guaranteed access to the primary goods with realizing our moral powers, and given that our lives as citizens represent but a small fragment of our lives as a whole, it can be argued that, on the basis of his own analysis, they are *critical* to all aspects of our lives in community. Surely, as important as cooperation and mutual respect undoubtedly are within the well-ordered community, they are yet more important within smaller and more intimate associations where the dangers of abuse and overreaching are much greater. If we are not free and equal moral persons within our families and do not receive the care and nurture essential if we are to become such, the likelihood that we will act as such within the wider community is slim indeed. Whilst we may well be much more than this model suggests, on no account ought we be less. Yet nothing approaching this model has ever, in theory or in practice, been applied to the relationships within family groups, whether formal or informal. If Rawls is right (and I believe he is) about the connection between a fair share of the benefits of social cooperation and full realization of our moral powers, surely it is of critical importance that *none* be excluded. Fair terms within a traditional family would seemingly require that the homemaker enjoy access to resources equivalent to that presently enjoyed by the breadwinner together with the freedom and leisure time to permit access to what Rawls characterizes as the powers and prerogatives of offices and positions of responsibility. In families in which both parents worked, the terms would be different. The message is this. As Rawls recognizes, independent access to certain

124 *Ibid.* 22-23. See also Rawls, 'Social Unity and Primary Goods', *loc. cit.*, and Rawls, *A Theory of Justice*, *loc. cit.*, 92-95, 142-145, 253, 260 and 433-439.

125 Rawls, *A Theory of Justice*, *loc. cit.*, 462-479.

social and material goods is critical to full participation in contemporary society and the moral and social benefits attendant upon this. These goods are not optional extras, but '*necessary conditions for realizing the moral powers*'.¹²⁶ Those who lack this access are deprived of much more than simply a shopping list of social goods, they are deprived of some of the means essential if they are to realize themselves as free and equal moral persons.

Despite the clarity of Rawls' justification for asserting that representative individuals reasoning from the appropriate position would endeavour to maximize their access to the primary goods, and his recognition that the basic structure of society '*favors some starting places over others in the division of the benefits of social cooperation*', he also argues that only two positions are relevant, '*that of equal citizenship and that defined by [the individual's] place in the distribution of income and wealth*'.¹²⁷ He makes two further assumptions, that other positions are entered into voluntarily, and that income and wealth are sufficiently correlated with power and authority to avoid indexing problems. The first of these assumptions is theoretically problematical and will be addressed later, the second is an assumption of fact which is open to challenge. Indeed, a part of the intent of this thesis is to challenge this particular factual assumption with respect to women.

RAWLS AND PARTIAL COMPLIANCE

When addressing the issue of partial compliance, the application of just principles to an unjust social order, Rawls for the first time acknowledges that other positions may, under some circumstances, need to be taken into account, as when *unequal basic rights* are allocated on the basis of biological characteristics such as sex. With regard to this possibility he notes that

*if men are favored in the assignment of basic rights, this inequality is justified by the difference principle only if it is to the advantage of women and acceptable from their standpoint.*¹²⁸

There is an inherent, and interesting, ambiguity in this passage. Earlier, Rawls explicitly identified the basic rights with the principle of equal liberty and that of fair equality of opportunity.¹²⁹ Interpreted in the light of those remarks this passage suggests that where unequal political rights are attached to biological characteristics the resultant inequality can be justified using the difference principle. That is, where biological characteristics are used to

126 Rawls, 'The Basic Liberties and Their Priority', *loc. cit.*, 22.

127 Rawls, *A Theory of Justice*, *loc. cit.*, 96.

128 *Ibid.*, 99.

129 *Ibid.*, 97. I note here a certain lack of clarity in the term 'basic rights'. I take Rawls to mean '*those rights and liberties required by the principle of equal liberty and the principle of fair equality of opportunity*', which p. 97 would suggest.

assign unequal political rights¹³⁰, it will no longer be sufficient to view the justice or otherwise of the social order simply in terms of the position of equal citizenship and that defined by the individual's position in the distribution of income and wealth. Rather, in determining whether or not diminished access to the basic rights is acceptable, the difference principle is invoked. Diminished basic rights can be justified only if such can be shown to be to the advantage of the disfavoured group and acceptable from their perspective. Richards has commented with respect to this passage that

*it does seem to be one indication of the intuitive acceptability of this criterion of justice that men have for centuries been justifying the subjugation of women on exactly this principle.*¹³¹

While Richards apparently misinterprets Rawls' qualification, in that her remark suggests that it is the perspective of the advantaged which is to be given weight, on another level her remark addresses a fundamental difficulty in Rawls' text. While economic indicators can be used to measure advantage in the context of the distribution of income and wealth, what form of similarly objective indicators are available in the context of basic political rights, and, far more critically, who is to be empowered to determine what constitutes an advantage given the absence of any form of objective index of relative advantage? Basic common law texts purported for some centuries to show that diminished access to basic rights was, in fact, positively to the advantage of women¹³² and that the legal restrictions imposed were for their benefit. In this context, advantage becomes a very slippery concept. It is difficult to comprehend how, under reasonably stable conditions, diminished access could ever be to the advantage of those whose access was diminished thereby.

The logic of the difference principle is more difficult to apply in the context of basic rights than in an economic context. While, in terms of the distribution of income and wealth, it may be reasonable to assume that, under the constraints provided by the difference principle, enhanced economic activity and development on the part of the most advantaged group will result in a 'larger pie' and thus advance the well being of the least advantaged group¹³³, it is

¹³⁰ The explicitly political rights include freedom of thought and conscience, freedom of association, that freedom defined by the liberty and integrity of the person and by the rule of law, the political liberties, freedom of movement and free choice of occupation, and fair equality of opportunity.

¹³¹ See J.R. Richards, *The Skeptical Feminist*, London, Routledge & Kegan Paul, 1980, 98. N.B. the arguments put at pp. 98-120. As Richards notes, it is never enough merely to prove that women are disadvantaged in comparison to men, it must also be shown that this is unjust.

¹³² 'Even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.' Kerr, Vol. I, 421.

¹³³ Rawls himself makes it clear that this must be argued to justify economic inequality under the difference principle. See *A Theory of Justice*, loc. cit., 78.

not clear that the basic rights and liberties are 'scarce' in the same way. It is difficult to construct a situation in which diminished access to the basic rights would actually rebound to the advantage of women in the sense that equality of access to such rights would, in and of itself, worsen their actual position. To suppose this presupposes social conditions such that it would be impossible to simply extend political rights, freedom of conscience and association, and other basic rights to women. Rather, it seems necessary to assume that the move from diminished access to an equal division would result in less adequate protection for the basic liberties of all individuals, including the least advantaged group, a condition which might obtain where extension of equal rights was likely to precipitate civil or religious war or where such group was so disadvantaged overall that they might become a danger to themselves or to others, a curiously Hobbesian scenario, and one which, I would suggest, rules out the possibility that such a society could be characterized as nearly just.¹³⁴

Rawls may also be suggesting that restricted access to the basic rights might under such circumstances be compensated for by other social advantages. This seems unlikely given that he elsewhere argues that liberty is to be restricted only for the sake of liberty.¹³⁵ The possibility remains open, however, when addressing partial compliance and is, for that reason, important to explore. On this interpretation, it becomes extraordinarily difficult to establish the appropriate perspective in the qualification '*and acceptable from their perspective*'. While '*their perspective*' clearly signifies the perspective of the least advantaged group, equally clearly, in addressing these non-ideal theory problems one might think that we have left the abstraction of the original position far behind. Rawls indicates that acceptability is to be established by the constitutional convention or by the legislature, which suggests that the advantaged are empowered to establish what the least advantaged group would deem acceptable, and in the context of the basic rights I believe that this remains so despite Rawls' insistence that its members are to adopt the perspective of the least advantaged.¹³⁶ We are, after all, talking of basic rights, including political rights, and the relevant inequality may include total lack of access to the political process. The absence of any form of 'objective index' enhances this difficulty, indeed, foreshadows a collapse into subjective reasoning. Under such circumstances, I must insist that acceptability is not in fact defined from the perspective of the least advantaged group, but rather from that position which the

¹³⁴ I cannot escape a sense of disquiet at a line of reasoning which suggests that where justice is most urgently required it is also most open to compromise.

¹³⁵ On this interpretation Rawls would essentially be returning to what he terms a more general conception of justice, that is, '*all social values - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.*' *Ibid.*, 62. The second approach may be found at p. 250. He acknowledges that the priority of liberty is only required under '*reasonably favorable conditions*' and if conditions such as those described in the last paragraph prevail, this condition may well not be met. Rawls, 'The Basic Liberties and Their Priority', *loc. cit.*, 11.

¹³⁶ Rawls, *A Theory of Justice*, *loc. cit.*, 248.

comparatively advantaged *assume* to represent the perspective of the least advantaged group, in which case Richard's critique is valid.

If, on the other hand, the relevant perspective is the actual perspective of those whose liberties are curtailed, it may well be that within any given non-ideal community a substantial number of women might find that social advantages derived, for example, from marriage, provided ample compensation for a diminution in basic rights. It is well to recall that many advantaged women bitterly opposed the suffrage movement in England and the United States. Once we descend from the abstraction of the original position to perspectives characteristic of specific communities, perspectives which are socially created and both class and period specific, a reference group must be defined. The use of women as a reference group on the non-ideal level is problematical because women are divided by class, by status, by background and by training, and their interests *qua* women may well be a function of their relative position within the hierarchies designated by those other factors. Identifying a 'representative woman' appears almost impossible given the absence of objective criteria. Likewise, returning to the suggestion that the threat of religious or civil war and consequential diminished rights for all might make unequal basic rights to the advantage of women generally, women might well, under those conditions, find diminished rights preferable to the consequences of war both for themselves and their children, however this moves us well beyond the conditions which might be said to exist in a nearly just society seeking to order its institutions in accord with the principles of justice. Rawls' text is ambiguous, in that he asserts that the basic liberties may be constrained only for the sake of the equal liberties themselves when discussing a diminution in the basic liberties overall, but fails to reiterate this condition precedent in discussion of the possibility of unequal distribution of the basic liberties. Rather he alludes to the potential long-term benefits of temporary inequality, and the need for unspecified compensatory advantages for the deprived group, emphasizing that the various liberties are not all on a par, liberty of conscience and the rights defining the integrity of the person taking priority over the political liberties and fair equality of opportunity.¹³⁷ There is a very real difficulty here, one which, to my knowledge, has never been considered by Rawls. Even if he is correct in suggesting that the various liberties are not all of equal significance, once any group is excluded both from the political process and from fair equality of opportunity, it is difficult to understand how other social roles might be said to be voluntarily assumed, and this difficulty is, I believe, absolutely critical.¹³⁸

137 *Ibid.*, 247.

138 See C. Hamilton, *Marriage as a Trade*, Detroit, Singing Tree Press, 1974, being a facsimile reprint of the 1909 edition published in New York by Moffat, Yard & Co. Hamilton argues that in marriage a woman exchanges her person for the means of subsistence, and further, to the extent that marriage represents the primary trade open to women, it is akin to slavery. In this context, Rawls' clear concern with stability and with the possible may well have blinded him to the real implications of his remarks.

A further theoretical difficulty arises in considering partial compliance because on Rawls' own argument what is actually being diminished is the social conditions necessary if we are to develop and exercise our moral powers to the same extent as others similarly situated, and surely this particular disadvantage signals a deprivation sufficient to eradicate the possibility of any advantage, other, perhaps than in a utilitarian sense. Rawls himself acknowledges that '*if the equal basic liberties of some are restricted or denied, social cooperation on the basis of mutual respect is impossible.*'¹³⁹ The basic rights are important, not as ends in themselves, but because they define the political and social conditions essential for the realization of the moral powers, and given their priority, play a more critical role than do income and wealth. The structure of the principles of justice emphasizes the priority of the basic liberties and Rawls clearly believes that inequalities in respect of them can only be justified if they represent an unavoidable stage in moving towards full compliance. Under unfavourable circumstances we must be concerned with the art of the possible and the acceptable, with maintaining social stability and responding to the problem of order.

The ambiguity follows from the awkward transition from ideal theory to non-ideal theory with the attendant problem of partial compliance. Having accepted that reasoning must proceed on the non-ideal level and that we are reasoning in terms of partial compliance, however, it also seems deeply linked to Rawls' insistence that '*the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines.*'¹⁴⁰ When we are discussing problems of partial compliance, and, in particular, contemplating social and historical conditions under which unequal rights are assigned on the basis of biological characteristics, we are contemplating profound controversy within society, indeed, dispute and division so profound that the extension of equal basic rights would likely lead to civil disorder. One set of social conditions which might 'justify' diminished basic rights for women would arise where the consequence of assuring equal rights would be a full scale civil or religious war with a consequential degradation of the rights of all. Given the Hobbesian alternative, the conditions for the operation of the difference principle might well be fully met. That is, a lesser liberty would rationally be preferred to the probable outcome of severe civil conflict together with the attendant risks and the likelihood of further deprivation for all. The problem of partial compliance arises, in this context, in a situation in which insistence upon equality of basic rights would result lead to a breakdown in social cooperation and deny institutions which are, perhaps, 'reasonably just'¹⁴¹, the support they require to

139 Rawls, 'The Basic Liberties and Their Priority', *loc. cit.*, 53.

140 See Rawls, 'Justice as Fairness', *loc. cit.*, 223.

141 It is, of course, difficult to know what reasonably just means in this context. Institutions which are reasonably just from the perspective of those who enjoy the basic rights are not necessarily reasonably just from the perspective of at least some of those deprived of them. Justice appears, in these passages, almost to slide into a curious form of moral relativism.

survive and to approach more closely the ideal of a well-ordered society. Rawls' aim, as he acknowledges, is a political conception which is practical, one which deliberately filters out divisive issues and those concerning which there is ineradicable dispute.¹⁴² As Rawls notes, one of the great virtues of justice as fairness, is that, given the

*mutual good of mutual justice [it shows how] a modus vivendi with the content of a liberal conception of justice might gradually develop over time into an overlapping consensus*¹⁴³

and thus, on the non-ideal level, its institutions might more nearly approximate the content of justice as fairness. In this context I note MacKinnon's comment that

*Objectivity is liberal legalism's conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality. If rationality is measured by point-of-viewlessness, what counts as reason will be that which corresponds to the way things are. Practical will mean that which can be done without changing anything.*¹⁴⁴

MacIntyre, working within a very different frame of reference, has put fundamentally similar arguments. He suggests that *'the overriding good of liberalism is no more and no less than the continued sustenance of the liberal social and political order'*.¹⁴⁵ While Rawls acknowledges that citizens may lack the capacity to see themselves apart from contentious moral, religious and philosophical convictions, and indeed, apart from enduring attachments and loyalties, *'these convictions and attachments are part of what we may call their "nonpublic identity"'*.¹⁴⁶

Even in a society such as our own, one which might, perhaps, be characterized as 'nearly just', difficulties remain and these difficulties become central when we consider gender roles and the structure of the family and the impact of these institutions upon our access to the social bases of self-respect. In filtering out divisive philosophical, moral and religious questions, Rawls also filters out issues concerning the family and the inequalities attendant upon gender roles. We earlier saw this at work in the structure of the original position, and, in particular, in the fact that nothing in Rawls' account of social goods suggested that in the original position the universality of family structures and the prolonged dependence of children was taken into account in determining legitimate claims upon social institutions. Our deeply held convictions and attachments are private, and precisely because convictions concerning the

¹⁴² *Ibid.*, 230. Cf. Rawls, 'The Idea of an Overlapping Consensus', *loc. cit.*

¹⁴³ Rawls, 'The Priority of the Right and Ideas of the Good', *loc. cit.*, 274.

¹⁴⁴ C.A. MacKinnon, 'Feminism, Marxism, Method and the State' 8 *Signs: Journal of Women in Culture and Society* 635, 644-645 (1983).

¹⁴⁵ MacIntyre, *loc. cit.*, 334-348, esp. 345.

¹⁴⁶ Rawls, 'Justice as Fairness', *loc. cit.*, 241.

primacy of the family and of family life, the 'naturalness' of the woman/mother/family equation, and the ways in which it is appropriate for women to negotiate the public/private division are among the most central and deeply held moral convictions in contemporary society, and because, more than ever, they have become the subject of profound dispute, they apparently remain apart from our identity as citizens, and have little relevance to justice. These comprise our non-public identity. The critical assumption here, one emphasized by Rawls, is that apart from the two positions which are relevant to political justice, equal citizenship and that defined by the distribution of income and wealth,

*other positions are entered into voluntarily [and therefore] we need not consider the point of view of men in these positions in judging the basic structure. [Rather,] in judging the social system we are to disregard our more specific interests and look at our situation from the standpoint of these representative men.*¹⁴⁷

Given Rawls' failure to address the universality of family structures and the impact of the biological division of labour upon social and economic equality, it would appear that his representative men are also biologically and socially male.

The difficulties encountered in locating women within the structure of justice as fairness make it clear that the core presuppositions of liberal theory remain dedicated to sustaining the traditional division between public and therefore open to rational public dispute, deliberation, and political decision making, and private and therefore concerned with those enduring convictions, attachments and loyalties which lie beyond or outside of politics. Reasoning which commences from mutual disinterest emphasizes independent entities advancing claims upon one another rather than interdependent men and women acknowledging pre-existing social bonds and attempting to explore their legitimacy and their limits. Indeed, Rawls emphasizes this by indirection when he notes that

*normally we do not have anything like a fully comprehensive religious, philosophical, or moral view . . . [which] means that the goods internal to political life . . . are more likely to win an initial allegiance that is independent of our comprehensive views and prior to conflicts with them.*¹⁴⁸

Despite the fact that justice as fairness represents a political conception merely, our role as citizen is conceptually prior to our affirmation of specific and comprehensive religious, philosophical or moral views. That is, insofar as children have been educated to meet the minimum requirements of citizenship, have come to understand that all citizens accept and mutually acknowledge the same principles of justice, that the public institutional structure of their society is known or believed to satisfy these principles, and that their fellow citizens have a normally effective sense of justice, their allegiance to political society will to some extent

¹⁴⁷ Rawls, *A Theory of Justice*, loc. cit., 96-97.

¹⁴⁸ Rawls, 'The Priority of the Right and Ideas of the Good', loc. cit., 274.

shape their more comprehensive views when and if conflicts arise.¹⁴⁹ Rawls emphasizes that unlike our role as citizens our other social positions, including our family relationships, are entered voluntarily, and that in choosing to fill them we are acting to further our final ends as we perceive them.¹⁵⁰ As citizens, we are bound to respect one another as free and equal moral persons and to realize the civic virtues in respect of our conduct towards one another. As private men and women, we remain free to withdraw from the modern world and its culture, seek lifeways appropriate to our comprehensive conceptions of the good, provided that they do not require the political repression or degradation of others as was the case with slavery or require politically enforced religious intolerance in order to survive. So long as the rights of those who may wish to withdraw their allegiance are protected so far as is practicable, we remain free to pursue more comprehensive ideals within our private communities. Unfortunately, the issue of distributive justice for women cannot be separated from their roles within these private communities. The critical issue is the integration of the public and private, not a further justification for ensuring that they remain apart.

149 *Ibid.*, 267-271.

150 I should note that while I accept that this may be true to a significant extent of many concrete social positions, it is not in any sense true of our perceptions of appropriate gender roles, given that the essentials of these roles are internalized long before we can in any sense be said to voluntarily occupy a position.

CHAPTER 4

CONTEMPORARY CONCEPTIONS OF THE DIVISION BETWEEN PUBLIC AND PRIVATE

INTRODUCTION

In the first three chapters we looked at various conceptions of the division between public and private and sought, particularly in the last chapter, to emphasize the degree to which addressing the nature and pervasiveness of women's inequality compels us to confront the basis for this distinction and the justifications which can be offered for it. It has been argued that the pervasive economic and social inequality of women is a consequence of their private roles, and that, to the extent that contemporary egalitarian theories offer accounts of distributive justice which fail to address the relationship between private roles and public inequality they risk becoming substantively irrelevant to distributive justice for women. Now we must begin to look more closely at the ways egalitarian theory attempts to negotiate the division between public and private and the relationship between these attempts and the distinction between the right and the good. So doing, we shall examine traditional liberal concepts such as autonomy, and explore the relationship between the public/private distinction and what have, in recent feminist theory, been characterized as two distinct modes of moral reasoning, the morality of the ladder and the morality of the web.

The traditional public-private distinction has been subtly reformulated by egalitarian liberals. Modern egalitarians accept that government is entitled to regulate the marketplace, set, at least to some extent, the terms of production and exchange. Every citizen ought to be entitled to expect that his basic needs will be met, that he will receive a sufficient share of social resources to enable him to remain independent. These are defined as public activities, functions which it is proper that government carry out. This acknowledgment provides a point of entry, involves political authorities of various kinds in the internal functioning of the sphere of production and in the affairs of the household.¹ While the aim of this intervention is to

¹ This appears in various forms. With respect to the market, consumer protection legislation in various jurisdictions, including, but not to be taken to be limited to the *Trade Practices Act 1974* (Cth.), the *Consumer Credit Act 1981* (N.S.W.), the *Chattel Securities Act 1981* (Vict.), the *Goods (States and Leases) Act 1981* (Vict.), and the *Consumer Transactions Act 1972-1980* (South Australia) significantly curtails contractual freedom within the marketplace. Equally, the employer/employee relationship has been significantly altered by legislation such as the *Sex Discrimination Act 1984* (Cth.) and the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth.), to name but a few instances of legislative intervention. Many Australian states have comparable legislation in force. Of particular note are the provisions in the *Sex Discrimination Act 1984* dealing with sexual harassment. Within what is conventionally thought of as the private sphere, legislation such as the *Child Welfare Act 1960* (Tas.), the *Children (Care and Protection) Act 1987* (N.S.W.), the *Community Welfare Services Act 1970* (Vict.) both provides badly needed services for children whose home conditions are inadequate and provides a point of entry into the private household for public agencies. While laws dealing with the protection of children provide the most obvious point of entry, increasingly legislative attempts to address

ensure that all persons have the resources needed to act as citizens, to undertake public roles, this must be balanced against the competing demand for moral independence², for a sphere of decisions and choices in which individuals are responsible solely to themselves for their own conduct.

The acknowledgment that economic domination is a public reality, a matter of political concern, and, equally, a matter for political redress, has expanded the frame of reference of the debate. The radical character of this step, at least within the context of liberal political and legal theory, is not fully acknowledged. Fundamentally, this alteration accepts that, in the real world, unless each one of us is guaranteed access to those things all of us need to survive and to realize other ambitions, we will be forced to submit to the authority and the demands of others in order to survive on a physical level. Still more importantly, it recognizes that people take advantage of their fellows in subtle ways, and that all too often wealth and power are used to provide the semblance of authority and justification. The positions people occupy with respect to others, positions within the sphere of production and the household, provide the basic substructure for political domination as well. In this way, albeit by indirection, egalitarian theory acknowledges that how people are perceived by others and how they come to perceive and understand others indirectly reinforces differences in status and power and opens the way for political subordination. Crucially, no formal acknowledgment has yet been made, on a theoretical level, that precisely the same conditions apply to family relationships as to the relationships which obtain within the marketplace and within political society.

The acknowledgment made by egalitarian theorists of the reality of social and economic domination has been weakened by their failure to extend the same critical gaze to basic human social structures, particularly families, and by their reluctance to consider the adequacy of conventional models of thought and analysis. In accepting, apparently without serious analysis, the traditional division between the rational world of political thought, the productive domain of the marketplace, and, in post-Enlightenment theorizing, the domestic and private sphere of affect and consumption, such theories seemingly accept as well the

domestic violence also do so. Equally, in most jurisdictions in the United States, access to welfare benefits is contingent upon the recipient providing access at any reasonable hour, with or without prior appointment, to the residence of the recipient of the benefits. Ostensibly, the visits are to ensure continued eligibility. In fact, they are to assess conditions within the home, the level of child care provided, and, frequently, whether or not the recipient has entered into any relationship with a man such as might lead to the supposition that he has become responsible for supporting her and her children.

² An issue which seems relevant here, but which is not explicitly addressed by contemporary theorists, is the connection between moral independence and economic independence. I suspect that, in company with Kant and Rousseau, they view economic independence as a prerequisite for moral independence. In practice, of course, the political provision of resources has, historically, been accompanied by intervention and control, leaving open the question of the attainability of this goal.

gender roles reflected by these divisions. Traditionally the world of politics and political thought epitomized reason and justice, the resolution of conflicts by means of objectively applied standards, and that world was, until recently, wholly reserved for men. Men and masculinity have long been associated with rationality and objectivity, with the resolution of conflicts through rules, and with the surmounting of particular ties to render such decision making possible. Women, on the other hand have long been associated with the emotional, the subjective, the denial of conflict and the preservation of relationships, often at all costs. Like politics and law, the market, in theory though never in reality, was reserved for men. The competition of the marketplace where preferences are satisfied and goods and services exchanged epitomized action and the struggle for survival, the inevitable competition for scarce resources, while the home and the woman within it came to epitomize stability and security, the absence of struggle and achievement, indeed the negation of both. These multiple distinctions and divisions are epitomized by the prevailing distinction between the public and the private spheres, and by the cultural conventions which continue to associate the public sphere with reason, with competition, with achievement and recognition and with masculinity, even while they associate the private sphere with emotion, with harmony, contentment and altruism, and with femininity. Prevailing conventions concerning the meaning of objectivity and independence, ruling definitions of productive work, work which attains value because it complies with the preferences of the community as expressed through the marketplace, have come to represent, not the views of an historically situated and culturally defined gender role which occupies a position of relative political and economic power, but universal human standards. Thus, a focus upon independence, upon deliberation and resolution by abstract and objective standards is identified as rational. A mature and rational individual is defined as one who is able to comply with these standards. What is at stake is nothing more or less than what it means/ought to mean to be an autonomous individual. The meanings which dominate legal and political culture are not 'givens', but essentially contested concepts open to multiple interpretations.

THE ROLE OF AUTONOMY IN CONTEMPORARY THEORY

The ambiguity inherent in the concept of autonomy plays a central role despite attempts by modern theorists to downgrade its importance. Pitkin suggests that

autonomy . . . evokes a wide range of meanings, some personal, interdependent, but also in mutual tension. And at every level and in every sense, the idea of autonomy is itself problematic, implying both a connection and a separation: a separation that challenges, denies, or overcomes a connection. Thus, autonomy may be conceived either as a kind of sovereign isolation or, paradoxically, as the rightful acknowledgment of interdependence.

Pitkin suggests that the problematic of autonomy, while present in any human life or community is, in a sense, specifically characteristic of modernity. To the extent that 'autonomy concerns the question of how and to what extent I (or we) have become or can become a separate self (or community)', it is relevant in every epoch and for every human life. To the extent that

autonomy is construed as the condition of being '*free (but also forced) to make [one's] way in life*', reliant exclusively upon one's own abilities, its importance heralds the emergence of a particular modernist perspective, one which views dependence as contemptible and autonomy as the only proper goal for the truly human life.³ This tension or ambiguity dominates the modern egalitarian theories discussed earlier.

What Pitkin characterizes as '*a kind of sovereign isolation*' governs the formal structure of such accounts, epitomized by the 'original position' of Rawls and Dworkin's adult castaways. In the original position we are mutually disinterested representatives, heads of family lines rather than members of families.⁴ We strive to maximize access to those basic social goods essential to the development of our moral powers, and would be unwilling to assent to ongoing cooperative relationships unless this could be guaranteed.⁵ Rawls characterizes the 'rational autonomy' of the parties as expressed

*by their being at liberty to agree to any conception of justice available to them as prompted by their rational assessment of which alternative is most likely to advance their interests.*⁶

At the same time, and more ambiguously, they recognize that their natural advantages and the advantages which accrue from family background and social good fortune are in some sense 'common assets' which ought to be used to their mutual advantage as a community. The notion of 'common assets' surely implies an interdependence which goes well beyond the merely superficial. Were they not willing to acknowledge, at a quite fundamental level, that interdependence, acknowledge that talents and natural advantages are dependent upon and can only be realized in the context of a shared community, no conception of common assets

³ H.F. Pitkin, *Fortune is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli*, Berkeley, Univ. of Calif. Press, 1984, 8. See also the general discussion pp. 3-22.

⁴ There is a gender issue here as well. Men are more likely to perceive themselves and be perceived by others as heads of family lines, women more likely to perceive themselves and be perceived by others as members of families.

⁵ Rawls emphasizes that in the original position '*we may describe the parties as either the representatives (or trustees) of persons with certain interests or as themselves moved by these interests.*' He notes that '*it makes no difference either way*'. See J. Rawls, 'Kantian Constructivism in Moral Theory' 77 *Journal of Philosophy* 515, 524-525 (1980).

⁶ *Ibid.*, 524. More generally see the discussion of rational and full autonomy therein, pp. 515-535.

could arise.⁷ What remains lacking, is what Pitkin characterizes as yet another meaning of autonomy,

*the shared public freedom, that is, participation in the political activity by which the community makes decisions and shapes its collective principles and way of life, its nomos.*⁸

Individual liberty, political rights there are in abundance, but shared 'public' freedom, communal shaping of a way of life, a *nomos* in Pitkin's terms, remains out of reach. While the outcome of our interaction, the conflict between or balancing of our preferences, undeniably shapes our way of life, our moral agency in this regard is less than clear. We seem, in some respects, to express particular preferences, but seldom if ever to make choices in full knowledge and recognition of their consequences for ourselves and others, and our responsibility for those consequences. Rawls' ideals of a social union of social unions and a well-ordered community offer a theoretical vision of a communal way of life, but whether this vision is one which is consciously and collectively created by us or whether it is simply the outcome of our interaction in pursuit of our private ends is never clear.

Rawls explicitly denies that his conception of justice relies in any way upon traditional liberal ideals such as autonomy and individuality. As he notes,

*persons can accept this conception of themselves as citizens and use it when discussing questions of political justice without being committed in other parts of their life to comprehensive moral ideals often associated with liberalism, for example, the ideals of autonomy and individuality. The absence of commitment to these ideals, and indeed to any particular comprehensive ideal, is essential to liberalism as a political doctrine. The reason is that any such ideal, when pursued as a comprehensive ideal, is incompatible with other conceptions of the good, with forms of personal, moral and religious life consistent with justice and which, therefore, have a proper place in a democratic society.*⁹

⁷ Rawls introduces the conception of our natural advantages as a common asset in Rawls, *A Theory of Justice*, loc. cit., 101 where he states that 'the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be.' See also p. 179. This approach has been sharply criticized by Nozick, loc. cit., 228-231. Cf. the detailed analysis of Rawls' conception of common assets to be found in M.J. Sandel, *Liberalism and the Limits of Justice*, Cambridge, Cambridge Univ. Press, 1982, 77-82. See also pp. 175-183. Sandel argues that the construction of the difference principle and, in particular, its reliance upon the notion of common assets commits Rawls to 'an intersubjective conception of the self', to an account of the subject which implies that in certain moral circumstances we view ourselves not as separate individuals but as members of a community who can only realize their nature in social union. See p. 80.

⁸ Pitkin, loc. cit., 7.

⁹ See Rawls, 'Justice as Fairness', loc. cit., 245.

Yet, as we shall see shortly, even this raises questions, questions which go to the core of the egalitarian conception of the individual.

In this context, the distinction made by Cover between what he terms *paideic* community and what he terms *imperial* community is both useful and extremely revealing, and may be used to explore the implications of Rawls' position. Cover suggests that the universalist virtues associated with liberalism and exemplified by the attempts of modern theorists to develop a political conception of justice exist and '*are justified by the need to ensure the coexistence of worlds of strong normative meaning.*' [Emphasis in the original.] Cover describes *paideic* community as characterized by

(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. . . . Interpersonal commitments are characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses. . . . The second ideal-typical pattern, which finds its fullest expression in the civil community, is "world maintaining." I shall call it "imperial." In this model, norms are universal and enforced by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity - upon that which is external to the discourse itself. Interpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.¹⁰

Cover explicitly acknowledges the possibility central to my argument, that authentic moral commitment to even weak universalist norms must ultimately mandate a direct challenge to the values and beliefs of the smaller communities of which the social union is comprised.¹¹ This is particularly true when the principles implicit in our settled convictions are extended in directions which conflict with some elements of traditional lifeways. The possibility of demanding, or even actively encouraging, full substantive equality for women is precisely in point. Theorists such as Rawls and Dworkin apparently assume that we may become, as citizens, free and equal moral persons, even while, as private individuals, we perceive ourselves very differently, affirm very different conceptions of self and identity.¹²

¹⁰ See Cover, *loc. cit.*, 12-13.

¹¹ As we saw in the last chapter Rawls acknowledges this as well, explicitly rejecting the idea '*that only unworthy forms of life lose out in a just constitutional regime*'. See 'The Priority of Right and Ideas of the Good', 266 n. 25. The arguments put at pp. 266-268 operate explicitly in the context of the education of children and the values taught. Rawls argues that political liberalism is not entitled to foster values such as autonomy and independence as ideals to govern human life, but rather ought limit its educational program to ensuring awareness of constitutional and civic rights, the capacity for self support and encouragement of the political virtues.

¹² For further discussion of this point see Chs. 6, 9, 10, 11.

The downgrading of the need for authentic interpersonal commitments, shared loyalties, raises a further, perhaps even more serious question, that of whether, in the absence of a personal sense of responsibility and commitment, commitment to the moral imperative inherent in egalitarian theory can ever, as Rawls acknowledges it must, move beyond the merely prudential.¹³ Rawls believes that within a society constituted by the principles of justice, a well-ordered community in his terms,

*not only do citizens have a highest-order desire, their sense of justice . . . but they understand these principles as issuing from a construction in which their conception of themselves as free and equal moral persons who are both reasonable and rational is adequately represented. By acting from these principles, and affirming them in public life, as so derived, they express their full autonomy.*¹⁴

Now this is quite close to another traditional liberal conception of autonomy, the idea of obedience to self-given law, but a very long way from the interdependence implicit although never fully explicit in the justification for the difference principle. The critical transition is that from the original position to the well-ordered community. What it is crucial to understand about this transition is that the principles *chosen* under conditions of rational autonomy are those *affirmed* as a regulative ideal under conditions of full autonomy.¹⁵ We choose principles of justice behind the veil of ignorance, principles which we believe will maximize our capacity to attain our final ends, whatever they may happen to be and whomever we may discover ourselves to be. Under conditions of full knowledge we affirm our commitment to those principles and strive as citizens to act in ways which reflect our commitment to the political virtues of tolerance and civility, reasonableness and a sense of fairness. The desire to honour the principles thus chosen is

*the desire to be a certain kind of person specified by the conception of fully autonomous citizens of a well-ordered society.*¹⁶

Yet this remains problematical precisely because, as emphasized earlier, Rawls denies that commitment to autonomy as a moral conception or comprehensive ideal can be an essential component of liberalism as a political doctrine. As a political ideal, we must desire to be fully autonomous citizens in a well-ordered society, as individual men and women we may *reject* the

13 See the discussion in Rawls, 'Justice as Fairness', *loc. cit.*, 246-247. Rawls deals with this problem at length in 'The Priority of Right and Ideas of the Good', *loc. cit.*

14 See Rawls, 'Kantian Constructivism in Moral Theory', *loc. cit.*, 532. More generally, see the discussion of full autonomy at pp. 528-535.

15 The idea of rational autonomy in Rawls is epitomized by the construction of the original position, particularly the idea of the veil of ignorance. Full autonomy, on the other hand is represented by the reasoning of citizens *qua* citizens under conditions of full knowledge in the well ordered community.

16 *Ibid.*, 533.

ideal of autonomy as incompatible with our own final ends.¹⁷ The price, it would seem, is a self divided and at war against itself, multiple personality in the true sense.¹⁸

IDEAS OF THE GOOD AND THE NATURE OF MORAL REASONING

Rawls' insistence that liberalism is not to be understood as a comprehensive moral doctrine, but rather as a framework within which various comprehensive moral doctrines have the opportunity to flourish and to seek and gain adherents becomes particularly significant when contemporary accounts of the nature and structure of moral reasoning are examined. The trace or suggestion of a divided self discussed in the last section is clarified when we consider contemporary accounts of the nature of moral development. Rawls himself describes three general stages of moral development: these being the morality of authority, the morality of association and the morality of principles. The most developed stage of the morality of authority is characterized, Rawls notes, by certain characteristic virtues, among them being essentially unquestioning obedience, humility and fidelity to authority. In the morality of association, virtue is identified with the faithful embodiment of particular statuses or roles. Rawls comments that our moral understanding increases as we come to occupy different roles, such as those of good friend, or of good husband or wife, or good citizen, ultimately enabling us to move beyond the content of the roles themselves and aspire to universal ideals such as those of cooperation and fairness. In the most advanced stage, the morality of principles,

17 Rawls assumes that within a just basic structure, one which affirms the basic liberties and mutual toleration, comprehensive views affirming a wide range of conceptions of the good can and will flourish. He argues that the charge that liberalism is unjustly biased against religious or communal values could be sustained only if associations affirming these ideals could not flourish. Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 266-268. His basic argument is that such associations require the content of the liberal conception to survive in a pluralist society, that political liberalism provides the background conditions essential for them to flourish. The only alternative would be for such an association to itself attain hegemony and politically impose its ideals upon those who do not share them thus denying to others the freedom it would claim for itself.

18 MacIntyre's comments on the problem of self in liberal society are relevant here. See MacIntyre, *loc. cit.*, 346-347. MacIntyre notes that '*the problem of the self in liberal society arises from the fact that each individual is required to formulate and to express, both to him or herself and to others, an ordered schedule of preferences. Each individual is to present him or herself as a single well-ordered will.*' Yet this effort implicitly requires that conflict within the self be repressed. Rawls is remarkable in the degree to which he makes a problematic implicit in liberal ideals explicit and critical to liberalism as a political conception. Behind the veil of ignorance we strive to formulate principles which will maximize our access to certain social goods, whoever we may discover ourselves to be. Within the just community, we utilize our guaranteed share of these goods to further individual or associational final ends, ends desired in and of themselves. As a well-ordered community we strive to attain the final end of supporting just institutions and dealing justly with one another.

*moral attitudes are no longer connected solely with the well-being and approval of particular individuals and groups, but are shaped by a conception of right chosen irrespective of these contingencies.*¹⁹

There are two very different ways of looking at these stages when one is considering the question of justice and women. On the one hand, one might question a culture and a social structure which has both historically and in the present applied very different standards to men and to women. If one looks at the matter in this way, one asks why it is that women continue to be judged primarily in terms of their capacity to embody certain of the roles characteristic of the morality of association, most particularly those of wife and mother, even when such roles are clearly irrelevant to their other roles.²⁰ What is at issue on this account is not the moral development of women. Rather this question raises the very different issue of why women are conventionally judged, not as ends in themselves, but as more or less adequate embodiments of the concrete roles conventionally associated with femininity.

A second, very different question, is raised by recent feminist scholarship in moral development. Gilligan and others have argued that the conventional morality of the morality of association, Rawls' intermediate stage, provides the basis for the development of two different meta-ethical perspectives, a morality of principles in which the primary emphasis is upon the rights of others and non-violation of those rights, and a morality of responsibilities in which the primary emphasis is upon our responsibility to take into account the needs of others while simultaneously retaining self respect and sense of self-worth as a person and having regard to our own interests.²¹ The first meta-ethical perspective, epitomized by Rawls' account of justice, emphasizes autonomy, independence, the capacity to reason in terms of hierarchically ranked principles or standards, for example, the priority of the principle of equal liberty over the difference principle. The second, epitomized by Gilligan's work, argues that morally appropriate decisions are necessarily context dependent, that relationships must be taken into account in reasoning and that the moral problem is to preserve relationships and the integrity of the self simultaneously, to seek resolutions in which we become ends in ourselves while fulfilling our responsibilities to others. Gilligan argues that most mature individuals are able to reason equally successfully using either perspective, and to shift from

19 Rawls discusses this at pp. 462-479 in Rawls, *A Theory of Justice*, loc. cit. His reference to the general correspondence of the stages described with the account of moral development given by Kohlberg may be found at p. 460 n. 6 and p. 461 n. 8. See L. Kohlberg, *The Philosophy of Moral Development*, San Francisco, Harper and Row, 1981.

20 One might, of course, also question the degree to which the public culture enforces a sexualized view of women, whether through the media or through the sexualized workplace.

21 Generally see D.T. Meyers, 'The Socialized Individual and Individual Autonomy' in E.F.K. & D.T. Meyers (Eds.), *Women and Moral Theory*, Savage, Md., Rowman & Littlefield, 1987, 139.

one to the other in resolving moral dilemmas, suggesting that synthesis may be possible and desirable.

Building upon Gilligan's work, feminist scholars have characterized the morality of principles as the 'morality of the ladder'. It is characterized by a

*morality of rights and a hierarchy of rules that regulated the contest between highly competitive, independent individuals. It is a morality based on principles of non-interference with the rights of others. Justice is best served by the least interference with the autonomy of others.*²²

Rawls' overriding concern with those minimal assumptions essential to constrain bargaining within a stable consensus, and his emphasis upon tolerance epitomizes this. The alternative conception, termed the 'morality of the web', emphasizes *'fulfilling responsibilities to other people in particular circumstances, [and for this reason] justice becomes a contextual concept.'*²³ The former approach focuses upon resolving conflicts between separate and independent

²² K.E. Mahoney, 'Obscenity, Morals and the Law: A Feminist Critique', 17 *Ottawa L.R.* 33, 35 (1984). The metaphor of the morality of the ladder, a pattern or form of moral reasoning associated primarily, but not exclusively with men, and its complement 'the morality of the web', a pattern or form of moral reasoning associated primarily, but not exclusively with women originates in the work of C. Gilligan. See, generally, C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Harvard Univ. Press, 1982. In a similar vein to the passage cited in the text, but issuing from a wholly different perspective, MacIntyre has noted that *'the rules of distributive justice are both to set constraints upon the bargaining process, so as to ensure access to it by those otherwise disadvantaged, and to protect individuals so that they may have freedom to express and, within limits, to implement their preferences.'* See MacIntyre, *loc. cit.*, 337.

²³ Mahoney, *loc. cit.*, 34-35. I note also, however, the criticism levelled at Gilligan's affirmation of reasoning based upon responsibilities. Cf. C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, Harvard Univ. Press, 1987, 38-40. MacKinnon argues with some force that the 'different voice' perceived by Gilligan is simply the voice of the oppressed, and that *'women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak.'* See p. 39. Elsewhere, MacKinnon commented that *'when we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way.'* See DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, 'Feminist Discourse, Moral Values, and the Law - A Conversation', 34 *Buffalo L.R.* 11 (1985), 27. The point remains, however, that our being valued in the abstract as nurturers and care-givers has produced negligible concrete rewards. There is a good deal to be said for demanding that socially powerful institutions translate that value into concrete rewards, and according equal standing to the 'morality of the web' is essential to that effort. Another way of putting this last point is to suggest that the fundamental presumption of equality underlying the theories of Rawls and Dworkin is incomplete without the incorporation of assumptions concerning distribution of responsibilities. To become free and equal moral persons, to share fully in the benefits of social cooperation, we must also accept our responsibility to share in the burdens of social cooperation, including wholly individualized responsibility for subsequent generations. Otherwise men are likely to continue to realize a majority of the benefits while women carry a majority of the burdens. See Ch. 11 for extended arguments on this point.

individuals in such a way that their independence is reaffirmed and supported, the latter emphasizes resolving conflicts between individuals in a way which affirms and protects the value of interdependence while affirming also the needs of individuals to exercise independent decision making and responsibility to self within those relationships. It emphasizes that choices and opportunities cannot be interpreted acontextually, that they can be evaluated only when the circumstances of the choice and the options which are realistically available are understood. A web approach to the inequality of women, for example, might well argue that

*if women currently tend to assume primary responsibility for childrearing . . . we should figure out how to assure that equal resources, status, and access to social decision making flow to those women (and few men) who engage in this socially female behaviour. . . . [The aim] is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one.*²⁴

Such an approach emphasizes that to the extent that the lifestyles associated with prevailing gender roles are not costless relative to each other, it is impossible to determine the extent to which a lifestyle choice represents an actual preference for a particular lifestyle, a response to a socially constructed expectation, a preference for the rewards which accrue to a particular lifestyle as opposed to a preference for the lifestyle as an end in itself, or even an untidy and internally conflictual mixture. While the concrete example given was that of childrearing, a classic private sphere function, the thrust of a web morality would demand that this alteration in existing patterns of social rewards applies equally to the realms of politics, the marketplace, and the home. The aim is to emphasize the need for an alteration in perceptions of the social worth of choices which have been socially constructed as appropriate to different gender roles, not a privileging of any particular activity or any particular gender role.

Despite the apparent opposition of the morality of the ladder and the morality of the web it is critical to recognize that neither is adequate in and of itself. If the morality of the ladder has often found it difficult to account for interdependence and for the place of human relationships, a difficulty epitomized by the efforts of the social contract tradition to account for the political order in contractual terms, the morality of the web finds it equally difficult to account for individuation and for the place of responsibility to self and self-development. In a real sense, the division between the morality of the ladder and the morality of the web tracks and reinforces the division between public and private, the dichotomy emphasized by both Rawls and Dworkin between public and non-public identities. As citizens, we are to understand ourselves as free and equal moral persons, as fully autonomous individuals whose final ends are always open to revision. As private individuals we may understand ourselves in this way, however we need not, indeed may understand our identities in terms of the values of relationship and community. The priority of the right over the good symbolizes the hegemony

of the morality of the ladder over that of the web.²⁵ The claims we may legitimately make upon our *public* institutions are those established by the morality of the ladder. Perhaps, at least in part, this helps explain why nothing in Rawls' identification of basic social needs as the motivation for reasoning about justice reflects basic facts about human social life such as how concrete responsibility for the actual (as opposed to theoretical) well-being of subsequent generations ought to be rewarded and shared.²⁶ Such contextual questions with their emphasis upon relationships and responsibilities seemingly belong to the morality of the web, although I shall argue subsequently that the exclusion of such questions is not truly necessary, but rather suggests that Rawls (and Dworkin) have thus far failed to confront the full implications of their own egalitarian principles and the extent to which these principles, rigorously and ruthlessly applied have the capacity to shatter irrevocably the division between public and private.²⁷ What is lacking is recognition that neither the conception of the self prior to its ends which predominates in the accounts of Rawls and Dworkin nor the conception of self in terms of its social roles and relationships together with the responsibilities entailed by this perception which predominates in 'web reasoning' offer an adequate foundation for accounts of justice any more than they offer adequate guides for human life. What is required is a conception which emphasizes that people are simultaneously autonomous and interdependent, both self-defining individuals and individuals who cannot be considered apart from the social worlds in whose creation they participate. Every assertion of rights is at the same time the assertion of an entitlement to participate in the shaping of a social world, to engage in the project of world-creation and self-creation. We need to recapture a sense of the true value of what Pitkin terms our shared public freedom, together with the responsibilities that conception of autonomy entails.

Contemporary egalitarian theorists seek, not to make difference costless, nor to recapture shared public freedom in Pitkin's sense, but to compensate for the disadvantages arising from those differences which seem unchosen, morally irrelevant, differences such as race, family background and natural capacity. This follows from their relegation of contextual questions to the domain of the good. The distinction is epitomized by Dworkin's insistence that equality of resources be ambition-sensitive but endowment-insensitive. Where differential

²⁵ It is perhaps significant that Dworkin emphasizes contextual reasoning and the importance of our concrete and specific social positions in a recent discussion of ethics and the criteria of a life which is good in what he terms the critical sense. See R. Dworkin, 'Liberal Community', 77 *Calif. L.R.* 479 (1989), esp. 502-4. See also the fuller discussion of this concept in Ch. 9.

²⁶ Rawls does address the question of intergenerational justice in terms of the just savings principle, but this addresses the question of how the burden of capital accumulation and the preservation and advancement of culture is to be distributed between generations, not the very different question of the concrete care and nurture required by each member of every new generation and how the social costs of that care are to be met. See Rawls, *A Theory of Justice*, *loc. cit.*, 284 ff.

²⁷ See Ch. 6 & 11.

outcomes reflect, not a lack of the natural endowments needed to realize socially rewarded outcomes, but social choices made by individuals with approximately equal endowments, inequality, in the liberal sense, often seems to have been defined out of existence. What remains are gender roles, behaviours socially deemed 'male' or 'female', and a reward structure which pervasively accords socially male behaviours higher worth than socially female behaviours.²⁸ Equality prevails so long as biologically female individuals are enabled to fill socially male roles and biologically male individuals are enabled to fill socially female roles. If, on the other hand, we sought to make difference costless, we might

*insist that women and men who opt for socially female occupations, such as child rearing, be compensated at a rate similar to those women and men who opt for socially male occupations, such as legal practice. Alternatively, such occupations might be restructured to make them equally accessible to those whose behaviour is culturally coded "male" or "female".*²⁹

The critical distinction between these approaches lies in the information which is relevant to decision making in terms of distributive justice. Where we focus on natural endowments and the advantages or disadvantages conferred by social background, we focus entirely upon matters which appear outside the control of the individual and argue that these ought to be irrelevant to a fair share of the benefits of cooperation. When we focus upon contextual issues, upon the obligations and responsibilities which arise out of social practices and roles, we perceive individuals in the context of their social relationships, as people whose concrete choices and preferences are, at least in part, inseparable from those relationships. The former line of reasoning epitomizes the morality of the ladder, the latter, the morality of the web. If we are to escape this apparent impasse, as we must if we are to address the question of justice for women, we must attempt to fuse these perspectives. We must, that is, insist both that women (and children and men) be considered first and foremost as individuals to whom social and economic equality is due *as individuals*, and recognize that, at least under existing social and economic conditions, this cannot be done unless we evaluate their position in terms of the social practices and contexts which have generated advantage and disadvantage. This suggests that it is essential to examine the ways in which gender roles and social reward structures interact and the moral legitimacy of the preferences involved in this interaction. When the central theoretical focus is upon the manner in which socially female behaviours are compensated, whether women value care-giving and nurturing roles because, in an androcentric economic and social structure they have been valued for those roles³⁰, and, as

28 C. Cockburn, 'The Gendering of Jobs: Workplace Relations and the Reproduction of Sex Segregation', in S. Walby, (Ed.) *Gender Segregation at Work*, Stony Stratford, Open University Press, 29, 1988. See also Ch. 9 for an argument that feminine roles are characterized by limited access to the new property and limited security of tenure, both in the workplace and in the family.

29 Littleton, *loc. cit.*, 1301-1302.

30 Cf. n. 22 and the material by MacKinnon quoted therein.

women, only for those roles, or whether women value care-giving and nurturing roles because their moral development is experienced in terms of sustaining and fostering connection, rather than in terms of individuation and autonomy³¹, becomes irrelevant. Rather, examination centres, as it should, upon the extent to which behaviours are rewarded or penalized, and the *social practices* within which this occurs.

A focus upon socially female behaviours, and the private and economic roles associated with them and the rewards they make available provides a very different perspective from which to examine the social and political significance of the public/private distinction, and highlights the way in which it operates to reinforce the provision of intangible but ideologically significant rewards for socially female behaviours in the traditional family. Equally significantly, the same behaviours are penalized in female headed households and within the marketplace. Because the market is the realm of production and the household the realm of consumption, market activities command both public and private value. Household work and the labour involved in birthing and parenting are systematically devalued by the marketplace. They are necessary to support the marketplace, but lack the proof of worth (money) that market activities command. By analogy, market activities which parallel private caring activities presently categorized as women's work, activities such as nursing, the teaching of young children, and other service occupations, are conventionally devalued because they are regarded as women's work. The difficulty encountered in recruiting men for the teaching of young children and for nursing ought to be contrasted with the vehemence with which men have traditionally defended the practice of professions such as architecture, medicine and law as an exclusively masculine preserve. This is not simply an issue of the economic rewards available although surely this is significant. Rather, because these occupations continue to be seen as women's work, reflect socially female behaviours, any man engaging in them is effectively diminished in the eyes of his (male) peers, and this in turn ensures continuation of diminished economic rewards.³²

³¹ Cf. Gilligan, *loc. cit.*, and n. 22 and the accompanying text.

³² On the differential reward structures presently existing for work socially coded male and that socially coded female see the essays in Koziara, Moskow & Tanner, *loc. cit.* More generally on the way in which the labour of women is comprehensively excluded from conventional economic indicators, see M. Waring, *Counting for Nothing: What Men Value and What Women are Worth*, Wellington, Allen & Unwin, 1988. In Ch. 11 I argue that these reward structures may themselves be seen as inequalitarian and the preferences manifested by them fundamentally corrupt by egalitarian standards.

LIBERALISM AND THE FAMILY - CONTRACT, STATUS OR ASSOCIATIVE OBLIGATION?

INTRODUCTION

In the last chapter, we explored the theoretical connection between the public/private distinction and other conceptions central to the development of contemporary egalitarian liberalism. We noted the ways in which the quite traditional liberal ideals of autonomy and independence continued to play a central role in the structure of egalitarian theory. Likewise, we identified a critical connection between such concepts and the forms of moral reasoning which dominate their theoretical structures. It was argued that the priority of the right over the good tracks and mirrors the distinction between public and private. It was argued further that to the extent that liberal theories emphasize an exclusively political account of justice their theories will fail to address the inequality of women precisely because women's inequality is a consequence of the interaction of public and private and the relationship between them. To the extent that the responsibilities and obligations which deny women the opportunity to compete on an equal footing in the public sphere are conceptualized as private choices, as pertaining to the domain of the good rather than of the right, the social and economic inequalities which attend these choices will continue to be ignored. In this and succeeding chapters we will look at liberal theories, both classic and contemporary, in greater detail, and explore the resources which they make available to address marriage and family life.

Liberalism in all its forms seeks to establish and defend a sphere of individual liberty, a sphere of life in which the autonomy of the individual is almost unquestioned. In modern egalitarian theory, those spheres of life within which such ideals remain most central and most fully developed have become the sexual and the familial, those spheres Rawls identifies as the personal and the familial.¹ Family relationships are often characterized as natural, and by inference, non-political, indeed Rawls is at pains to emphasize the gulf between the political and the familial and the values appropriate to each. Within the political, relationships are or ought to be governed by rationally chosen principles reflecting the freedom and equality of citizens. Within the family, affect and inequality predominate.

Despite the astounding variety of forms which have developed in different cultures and within the same cultural traditions at different times and among different groups, family relationships are conventionally believed to be ordained by the biological conditions of human existence. Regardless of this presumed naturalness and despite attempts to insist that the role differentiation within household groups and the allocation of separate spheres of responsibility to men and to women is ordained by the laws of nature (or of God), the demarcation of these

¹ Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 242.

spheres is neither unquestioned nor constant. Only one division of labour can be described as natural. While men beget children and while, for men, reproduction may be described as an isolated and discrete act, for women, reproduction can only be described as a process commencing with sexual congress and concluding with the labour involved in bringing forth a child.² The transitory and instrumental character of the masculine role in reproduction, its inherent uncertainty, has often played a significant role in the power relationships between men and women. Because, for men, sex is temporally and conceptually isolated from the birth of a child, reproduction has often been perceived as something which must be brought under masculine control. The link between the act of creation and its product must be politically and socially established precisely because it is not naturally evident. This is most readily done through establishing masculine power over women. Through control of the mother, paternity may be made (relatively) certain, and it becomes possible for men to attempt to ensure that they do not expend labour and resources upon children which are not biologically theirs.

While not all cultures deem masculine control over reproduction important, it represents a major theme in our culture and was inherent in early liberal theories. Hobbes explicitly states

*if there be no Contract, the Dominion is in the Mother. For in the condition of meer Nature, where there are no Matrimoniall lawes, it cannot be known who is the Father, unless it be declared by the Mother: and therefore the right of Dominion over the Child dependeth on her will and is consequently hers.*³

For early liberals, the problematic nature of paternity necessitated patriarchal control of the family. Without patriarchal control, enforced by the laws of the state, fatherhood was irrelevant. The alternative, unthinkable in their terms, was a declaration of paternity by the mother, which left the father, as is clear from the foregoing passage, dependent upon her (essentially arbitrary) will. Rousseau expressed the same point even more forcefully.⁴ An alternative, of course, is trust, but trust demands that the man be prepared to acknowledge that his certainty depends upon the choices and decisions of another individual and freely accepts that this is so. The inequality of the initial positions of man and woman makes this more difficult than appears on the surface. The woman knows what the man must take upon

2 Here I adopt the arguments to be found in M. O'Brien, *The Politics of Reproduction*, London, Routledge, 1981.

3 Hobbes, *loc. cit.*, 254.

4 J.J. Rousseau, *Emile*, trans. by B. Foxley, Melbourne, Everyman's Library, 1911, reprinted with a new introduction, 1974, 324-325. Rousseau comments '*She to whom nature has entrusted the care of the children must hold herself responsible for them to their father. No doubt every breach of faith is wrong, and every faithless husband . . . is cruel and unjust; but the faithless wife is worse; she destroys the family and breaks the bonds of nature; when she gives her husband children who are not his own, she is false both to him and them, her crime is not infidelity but treason.*' See also Okin, *loc. cit.*, where Rousseau's concern with establishing paternity is emphasized at pp. 114-115, noting in particular his analogy between a wife's adultery and treason.

faith.⁵ The natural imbalance in their relationship is most conclusively overcome when his power over her makes it possible for him to trust her. The unstated given is, of course, the presumption that people, unrestrained by law, seek dominion over others.

The significance of the relationship between men and women for political relationships is, within contemporary male-stream political theory, either ignored or denied. Political philosophy essays the legitimation of power relationships, defining their bounds and establishing just limits for the exercise of collective power. Despite this, the most fundamental human power relationships, those within human families, seemingly require no legitimation. While such relationships may be regulated by the state, the political structure of the relationships themselves is denied. The exercise of power by men over women and by both men and women over children is perceived by society and by law as natural⁶ when it occurs within a socially sanctioned setting.

Early liberal attempts to account for family relationships oscillated between the contractarian and the biological. All sought to contrast political relationships and familial relationships, to maintain an absolute distinction between them.⁷ The contractarian view of marriage common to Locke and Hobbes must be distinguished from the 'naturalist' account of Rousseau. As is clear in the passage from *Leviathan* cited above, Hobbes saw contract as essential to the existence of the family, and to the existence of fatherhood itself. Similarly, Locke states both that '*the first Society was between Man and Wife*', and that '*Conjugal Society is made by a voluntary compact between a Man and Woman,*' although he attributes the necessity for this 'voluntary compact', or contract, to the prolonged neoteny of the human species.⁸ For both, once the family was established the relationships within it disappeared from politics. The identity of the wife was submerged in that of the husband, political theory mirroring contemporaneous legal reality.⁹

5 It is only within the last few years that genetic testing has been able to absolutely determine paternity.

6 A natural relationship is one which requires no legitimation.

7 Rawls clearly belongs to this tradition. See 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 242.

8 Locke, *loc. cit.*, 362-363. Rawls also emphasizes the voluntary character of non-political relationships among adults and contrasts these with the coercive and non-voluntary character of political society. Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*

9 Under the common law doctrine of coverture, the identity of the wife was submerged in that of her husband for the duration of the marriage. A married woman lacked contractual capacity, upon marriage her personalty vested absolutely in her husband who was also entitled to the control of her real property and to the rents and profits thereof. Her husband had exclusive guardianship rights over the children of the marriage and was entitled to appoint a guardian by will should he predecease her. See 32 *Hen. 8, cap. 28* s. 1 of which recognized the husband's right to lease and receive the profits of land held in right of their wives, 34 & 35 *Hen. 8, cap. 5* (Statute of Wills)

Rousseau was much more ambivalent. He attributed the origins of family life to the development of settled habitations which required defence. He states

*the first developments of the heart were the result of a new situation in which husbands and wives, fathers and children, were united in a common dwelling. The habit of living together gave rise to the sweetest feeling known to man: conjugal love and paternal love. Each family became a small society, all the better united because mutual attachment and freedom were its only ties.*¹⁰

The concluding sentence rules out any contractarian basis for the family. Rather, as human beings abandoned the isolated and nomadic existence of the proto-human phase and found it advantageous to engage in cooperative ventures increased proximity and permanent habitations led to the establishment of permanent relationships between men and women.¹¹ Rousseau's conception of the family seems today wholly sentimentalized, based not upon contract but upon proximity and upon the passions it engendered. Horowitz suggests that in Rousseau's view,

*society is not, then, the creature of the family. If anything, the reverse is true; the family is the creature of society. And the family is conceived of as the creature of society in much more than a juridical sense.*¹²

He appears to be correct. Rousseau suggests that as people formed communities, united not by law but by a common climate and lifestyle, the passions developed. He describes these early communities as assembling outside their huts and adds that

*singing and dancing, the true offspring of love and leisure, became the amusement, or rather the occupation, of men and women thus assembled together with nothing else to do.*¹³

What Rousseau is imagining is a community based, not upon law or concepts of morality or consent, but upon the natural passions of men and women living in a state of freedom.¹⁴ Only

which specified that a married woman lacked the capacity to devise land and could not bequeath chattels without her husband's authority. The statutory language equates married women to minors, idiots and the insane. See also *Tinker v. Colwell* 193 U.S. 473, 48 L.Ed. 574 (1904). The court emphasized that the cause of action involved in 'criminal conversation' was fundamentally proprietary, that such an assault was an injury to the property of the husband in his wife.

¹⁰ Rousseau, *The Essential Rousseau*, loc. cit., 176.

¹¹ *Ibid.*, 212.

¹² A. Horowitz, *Rousseau, Nature, and History*, Toronto, Univ. of Toronto Press, 1987, 78-79.

¹³ Rousseau, *The Essential Rousseau*, loc. cit., 178.

¹⁴ In some ways, Rousseau's account of the development of families prefigures some elements of Dworkin's account of associative obligations discussed later in this chapter. Points of similarity include the evolutionary nature of such relationships as social practices and the way in which the roles and obligations involved arose out of

with the advent of private property did a need for law and morality arise, and the destructive passions predominate. For this reason, Rousseau's account may be interpreted as supporting the view that the family reproduces the power relationships characteristic of the wider society.

While Rousseau believed that the capability for love and jealousy arose simultaneously, and these passions, together with the advent of property created the necessity for both morality and law, only with the development of private property and a sophisticated form of the division of labour, did human passions become so destructive they must be kept in check by law.¹⁵ The transition from an idyllic state where mutual attachment and freedom predominated to the civilized state in which the destructive passions predominate appears to have been a consequence of increasing social stratification. Just as the conditions within civil society necessitated the social contract, conditions within the family and the wider society necessitated the move from natural freedom and attachment to masculine authority.¹⁶

Despite the very different rationales family relationships remained outside the perceived scope of political theory. Even for Rousseau who recognized that the family was the creature of society, that these developments were necessarily interdependent, relationships within the family remained pre-political, outside the social contract and pre-existing it. Family relationships thus became somehow independent of history and culture. Only through surmounting such ties did political relationships become possible.

Equally, despite the 'naturalness' of family relationships and the ordained 'female role' within the family, family relationships have generally been both malleable and permeable. Today the state regularly intervenes under 'appropriate' circumstances. Minson can argue with some justice that, from its beginnings the family

*has always been cellular and to that extent apparently quarantined off from the realms of public - economic and political - life. Yet, at the same time, this "nuclear" family has always been permeable by public institutions, hence open to either compulsory or advisory outside interventions. Whilst these interventions have no single origin or purpose, the primary occasions for interventions have been issues to do with the care and control of children. On the one hand, the family, always in various and often conflicting ways, acts as a relay for the realisation of public objectives, ranging from the control of disease to the control of dissidence. On the other, the failures of families constitute the conditions for posing this permeability, i.e. for politically acceptable intervention into the familial domain.*¹⁷

the practice rather than being pre-determined by contract or by moral authority imposed from without.

15 Rousseau, *The Essential Rousseau*, loc. cit., 182-188.

16 See the detailed analysis in Ch. 8.

17 J. Minson, *Genealogies of Morals: Nietzsche, Foucault, Donzelot and the Eccentricity of Ethics*, London, The MacMillan Press Ltd., 1985, 183. More generally see J. Donzelot, *The Policing of Families*, trans. by R. Hurley, New York, Pantheon Books, 1979 and J. Eekelaar, 'Family Law and Social Control' in J. Eekelaar & J. Bell, *Oxford Essays in Jurisprudence*, Oxford, Clarendon Press, 1987, 125.

THE DISAPPEARANCE OF THE FAMILY

The disappearance of the family from contemporary political theory raises several interesting questions, questions about the character and nature of these relationships, about their economic and social implications, and about the legitimacy of state involvement in the regulation and control of private relationships. Such questions must be approached from several different directions. It is essential to understand the nature and character of family and household relationships if they are to be dealt with in a meaningful and accurate way within political theory. Unfortunately, much of the information needed to do so exists, if at all, in distorted and fragmentary form. The voices within the family itself, most particularly the voices of women and children, command credence only to the extent that they conform to the expectations and ideologies of a cultural, legal, and political elite. To the extent that conformity is not realized, both their households and their voices are identified as symptomatic of social pathology. Such voices exist on the margins of society, not because they are few in number, but because they have been socially and politically defined as abnormal and unrepresentative. If the disappearance of the family from contemporary egalitarian theory seems bizarre, we need only to remember that in ancient Greece political theory concerned the relationships of a tiny minority of those within the *polis*. Women, children, *metics* and slaves were excluded. Their interests might be disregarded. The *polis* achieved its self-proclaimed moral and spiritual perfection because its citizens were entitled '*to stand upon the bodies of its disenfranchised subjects*.'¹⁸

Similarly, the liberal political theories of the Seventeenth and Eighteenth Centuries emphasized the self-perception and demands of a rising and increasingly Protestant male middle-class. Both their perceptions and their demands were deemed objective. Political society regulated the relationships of men and political theory concerned itself with the laws needed to control and regulate competition among men. Within the household competition was declared not to exist. Thus, competition among men signified competition among households. Each household was represented by its male head, and his public status determined the status of the family.

Given the formally egalitarian impetus of much early liberal theorizing the denial that women's voices might be heard and counted in civil society seemingly compromises the principles espoused. Why, then, were women denied personhood? Two answers may be given. First, given early liberal premises concerning human nature, should women be recognized as persons, marriage and family life would become untenable and conflict of wills unavoidable. Ultimately, no true private sphere would exist, making a mockery of the freedom and autonomy affirmed. Second, reconciliation depended upon a further extraordinary

assumption, one which reflected the extent of the revolution in ideas and attitudes then taking place. Given the denial that inherited social status and family origins determined public status, given the presumption of political equality, only two forms of status were compatible with its presuppositions. The primary status, that of citizen, applied to men. This defined man's relationship to the state and had little if anything to say about his concrete social position with respect to his fellow citizens. His perceived status depended upon his occupational role, his relationship to the means of production. Those assumptions identified the ideal family as that family in which the sole functions of the female reflected her as wife and mother. Man's position was determined by his success in the economic market. Woman's position was determined first by her socially and biologically ascribed status as daughter of a particular man, and second by her success in the marriage market and her acquired status as wife of a particular man and mother of his children. Relationships within the family had been banished from the theoretical landscape.

Norton's analysis of the ways in which the market and the family relate to the 'late capitalist' state becomes revealing and significant in this context. Norton observes that

it is with regard to their standing before the late capitalist state that the two arenas of private life can be most clearly distinguished. . . . As the corporate monopoly and state sectors of the private economy become more broadly integrated with state administration and finance, the family is left to flounder in the interstices of administrative supervision. No doubt the continued existence of many small, low-status families comes to be predicated on the supply of state welfare and subsidized social commodities. It is precisely this supply that is endangered in times of economic crisis: it is the private economy and its proposed reindustrialization that hogs the lion's share of the public interest. To the family, the state offers traditionalist rhetoric, minuscule tax adjustments, and draconian measures designed to restore the dependency of women and unemployed youth upon an institution that can no longer sustain them. From the "heartless world" of civil society the family receives a familiar message. When push comes to shove it is the health of the private sector - the capitalist system of production, distribution, exchange, and capital accumulation - that must take priority over the intimate domain of private life, that is, families with their few remaining productive functions. Having long since transferred most of these to the state, economy, and other institutions of civil society, the family packs little clout with which to back up its demands. Cut off more than ever from the productive process, it can live free or die.¹⁹

I believe that Norton is correct. His perception of the vestigial nature of the family explains the virtual disappearance of sustained analysis of family structures and functions from contemporary liberal theory. Political theory focuses upon critical relationships, those of the individual to the state, the means of production to the state, and the individual to the means of production. When the family became marginal as a productive institution, it became almost irrelevant as a theoretical concern. It is significant that the transition from traditional fault based divorce regimes to contemporary no-fault regimes for the dissolution of marriage has

been accompanied by a more significant transition. Whatever the injustices and inadequacies of traditional regimes, they were recognizable as regimes of 'black letter law'. Modern no-fault regimes, by contrast, are discretionary, administrative in character, and generate pressure to ratify this development by replacing adversarial court based procedures with judicial ratification of the outcome of more or less informal forms of mediation and conciliation.²⁰ Another way of putting the matter is to suggest that, for the family, the rule of law is being gradually replaced by administrative discretion. This may also indicate the extent of the chasm between the ideological valorization of the family and its actual importance or value. As Rose notes

*Economic thinkers have been telling us for at least two centuries that the more important a given kind of thing becomes for us, the more likely we are to have these hard-edged rules to manage it.*²¹

Because family status was irrelevant to public status, because kinship had ceased to be a fundamental mode of political organization indeed, become almost irrelevant to it, it became tempting to ignore the family in theorizing. It seemed natural for individual to become synonymous with public person - with bourgeois citizen and market actor. The family remained useful as a scapegoat, of course, although it had been deprived of both political significance and economic role.²² Theoretically, it had become the raw material of minor sociological investigations rather than a constituent part of political theory. Given that its official roles had been limited to biological reproduction and the socialization of children, and given our cultural association of these functions with women, a reference to the family became a shorthand reference for the mother/child dyad, hardly a matter of theoretical significance. The relationship of the privatized nuclear family to the state and to production was mediated through the citizen, and just as the citizen of classic liberal theory had been the male head of the household, the citizen of contemporary theory might be viewed as the representative or

20 Eg. Family Law Council, *Arbitration in Family Law*, A.G.P.S., 1988; Weitzman, *loc. cit.*, 218-235; A. Gerard, 'Conciliation: Present and Future' & A. Bottomley, 'Resolving Family Disputes: A Critical View' in M.D.A. Freeman, *State, Law, and the Family: Critical Perspectives*, London, Tavistock Publications, 1984, 281 & 293 respectively.

21 C.M. Rose, 'Crystals and Mud in Property Law', 40 *Stanford L.R.* 577 (1988).

22 Norton notes that, 'in the United States, scholars and the media are preoccupied with the matter of the family's decay. On the one hand, the image of "the family in crisis" is backed up by mounting statistical evidence on divorce, marriage, the brutalization of women and children, psychopathology, and more. . . . On the other hand, the family lives on, if only because the society has found no functional equivalent for it.' Norton, *loc. cit.*, 265. Put another way, confronted by an exceptionally brutal gang rape by fourteen and fifteen year olds which apparently left the victim with irreparable brain damage, Mayor Koch of New York denounced the 'social breakdown' evidenced and said 'The family has to be accountable.' C. Bremner, 'A warp on the wild side', *The Australian*, 27th April, 1989. What he meant, of course, is that the breakdown of the traditional nuclear family is primarily responsible for the upsurge in violence.

head of the family line.²³ If, in the terms of classic liberal theory, the family was pre-political, for contemporary theory it has become almost irrelevant.

The definition of the family as private and outside the scope of political society engenders a number of serious conflicts in the context of contemporary liberal political theory. The most obvious concerns the theoretical legitimacy of the role of the state in regulating and defining the terms of family life. Within the frame of reference of classic social contract theory this posed no problem whatever. Because women ceded their identity to men upon marriage, because the family might be seen as pre-political, represented a limited state of nature, and the interests of the household were both represented and determined by its head, any form of regulation which was thought to accord with the interests of male citizens was legitimate. Within the state, men dealt with one another as equals, their relationships being regulated by the laws of the state. Within the family, all that remained were defined social roles. The position of women and children was determined by their relationship to men, and men's proprietary interests in their wives and children might be enforced by the state just as their rights to other forms of property might be enforced. Any form of regulation which protected men's proprietary rights in their wives and children and which minimized conflict and competition among men was appropriate.

For classic social contract theorists, other than Rousseau, the relationship between husband and wife was contractual. This, however, was a unique contract, one in which the wife ceded her identity to her husband.²⁴ Liberal theory abandoned the most obvious form of the dualism characterizing Greek thought, abandoned the claim that although the family was biologically primary, political life was ethically superior. The state was necessary to generate and enforce the rules needed to mediate competition for economic resources and to facilitate the transmission of property. The state served the world of production and exchange from above, provided the certainty and authority necessary to resolve conflicts among formally equal individuals establishing in this way a basis for mutual trust. The family both ensured a steady supply of new workers and citizens and met the biological and social needs of the present workforce thus freeing the worker from domestic and reproductive tasks and socially locating the responsibility for meeting the needs of dependent individuals. This last function is, from the perspective of the state, critical, and the contraction of the group whose dependence is politically enforced from the Elizabethan *Poor Laws* to the present marks the contraction of the family and its increasing political insignificance.²⁵

²³ Cf. Rawls, *A Theory of Justice*, loc. cit., 128-129.

²⁴ In some ways, it bore a striking resemblance to a contract to enter slavery.

²⁵ It is notable that the *Poor Laws* from 1601 onwards sought to locate responsibility for indigent family members upon both ascendants and descendants. For example, 43 Eliz., Cap. 2, s. 7 provided that 'the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain

CONTEMPORARY LIBERAL THEORY AND THE FAMILY

Earlier in this chapter two distinct, but nonetheless interconnected, points emerged. First, it became clear that the private family was perceived both as somehow outside the bounds of civil society and immune to legal intervention in the strict sense while nonetheless open to administrative and social intervention. Second, despite its official autonomy and independence, it became clear that the family served in the past and remains in the present a site of social control, a locus for intervention and restructuring. Now it is time to turn to contemporary theories and to begin to piece together their scattered references to family relations and family life and to deconstruct the ideological foundations upon which they are based.

Contemporary liberal theories which analogize political and legal obligations to reciprocal obligations which are supposed to arise naturally among family members present more serious conceptual difficulties than did early social contract theories. The ground of obligation and the concrete nature of the reciprocities within family groups is often neither analyzed nor examined, simply assumed.²⁶ Family relationships offer an attractive theoretical model of mutual responsibility and equality to such theorists, among them individual thinkers as diverse as Rawls and Dworkin, but the social and economic inequalities within existing families and the history and structure of the power relationships within them are either papered over or ignored. The reluctance of such theorists to extend to the family the same unblinking gaze extended to instances of political and economic inequality, together with the quite fundamental liberal assumption that individuals make choices and decisions designed to further their interests as they perceive them, reflects the blindness of liberal discourse to questions of power. When power is addressed at all, it is approached obliquely. Dworkin, for example, suggests that power is not the issue. Rather, concern with the unequal distribution of power may be simply a forceful way of calling attention to other, independently unjust, features of our social, political and economic culture. He comments:

Consider the common, and wholly justified, complaint that women have too little power of all kinds in most societies. Someone who takes that view might think that social organization is defective unless the average woman has the same influence over affairs. . . as the average man does. But someone else who makes the same complaint might mean something very different: not that men and women should, as a matter of right, have the same influence on average,

every such poor person in that manner and according to that rate, as by the justices of peace of that county . . . shall be assessed.' A provision in similar terms was in force in England until 1948. See *Poor Law Act* 1930, s. 14 which was abolished by the *National Assistance Act* 1948. Contemporary social welfare legislation in Australia has significantly restricted this responsibility, imposing direct obligations only upon those in marriage and marriage-like relationships and with regard to children under the age of 16. See *Social Security Act* 1947.

²⁶ Thus, in Rawls, *A Theory of Justice*, *loc. cit.*, Rawls notes the connection between the difference principle and the ideal conception of the family. See p. 105. Likewise, in Dworkin, *Law's Empire*, *loc. cit.*, Dworkin analogizes familial obligations and political obligations in developing his conception of associative community. See p. 195-216.

*but that the smaller influence women now have is the result of a combination of economic injustice, stereotype, and other forms of oppression and prejudice, some of which, perhaps, are so fundamental as to be carried in the community's culture.*²⁷

Dworkin is both right and wrong here. He is undoubtedly correct in arguing that the linkage between an unequal distribution of power and other, independently unjust, features of our culture is significant. He slides too easily over another, quite distinct, aspect of power. Power is a relational concept. It makes no sense to speak of power in the abstract, in *vacuo*. To the extent that questions of power feature in discourse, and, in particular questions of imbalances in power, we are not simply looking at a consequence of other, independently unjust social structures. We are looking at networks binding individuals to one another, at questions of dependence and independence, of domination and submission. We may be looking at networks with the capacity to create and sustain economic injustices, stereotypes, and other forms of prejudice. The reciprocity is critical. Dworkin quite correctly recognizes that the relative powerlessness of certain groups and individuals may be a consequence of other deeply entrenched injustices. Likewise, the particular pattern of these injustices in any given society is likely to depend upon the existing power structure within that society and the ideologies prevailing within it. Classifying these as stereotypes is far too easy, first, because a stereotype is simply a generalization which is applied unthinkingly and without due attention to individual differences, and second, because stereotypes themselves become current and pervasive only when they meet the needs of specific individuals or groups who *already* occupy positions of relative power.²⁸ Stereotypes serve both to justify and to reinforce existing imbalances in power and to provide an image of social relations in which certain accepted social roles become unquestionable. Indeed, a measure of their power is the simple fact that, the more successful the stereotype, the more pervasive its hold upon the imagination, the more limited our capacity to recognize it as such. Simply describing the female gender role as stereotypic is, therefore, inadequate and wanting in analysis. Rather, it is critical to examine the role itself, ascertain the purposes it serves, the values it reinforces.

²⁷ Dworkin, 'Political Equality', *loc. cit.*, 14-17. The passage quoted in the text may be found at pp. 14-15. Cf. Walzer's efforts to address the same question, and, in particular, his thesis that the problem is not imbalances of power in any particular sphere of human activity, but the way in which imbalances in any area tend to spread and permeate other domains. See generally Walzer, *Spheres of Justice*, *loc. cit.*

²⁸ For a discussion of the role of stereotypes as a form of social control see J. Doane & D. Hodges, *Nostalgia and Sexual Difference*, New York, Methuen, 1987. A very good example of the ways in which a comparatively powerful group can utilize and manipulate stereotypic imagery to its advantage may be found in the efforts of upper class feminists in the United State during the period before women were granted the vote. Their most successful arguments centred around the need for the purity of womanhood to find a public voice. So doing, they contributed to the development of the ideology of motherhood and successfully imposed that ideology upon less advantaged women. See Dally, *loc. cit.*, 124-150.

The pervasive association of femininity with marriage and with motherhood, the image of the dependent wife and mother as one whose life is wholly devoted to meeting the needs of her husband and children, remains one significant aspect of our cultural conception of ideal womanhood. Women remain, to a far greater extent than men, identified with the family and with the home, their status defined by their roles as wives and mothers. These roles, in turn, possess little, if any, independent status or authority within the wider community. The identification of women with their familial and domestic roles, an identification which depends upon their relationship to a particular man, defines their status in terms of that relationship. Women's status and identity, as a consequence, remain dependent, not in any real sense determined by their own efforts and achievements but assigned them as a consequence of their marital status and determined by their husband's efforts and achievements. This very dependence, in turn, has traditionally ensured that public power and status was effectively reserved for men.

During recent years a further trend has emerged. While the valorization of motherhood maintains its significance as conservative politics gains in ascendancy²⁹, legal changes, particularly in family law, proclaim a quite different message, emphasizing that women are equal citizens and equally responsible for ensuring that they are able to provide for themselves and their children.³⁰ These two ideologies are both current and, at least superficially, wholly irreconcilable. Two distinct and separate messages are being sent, the first of which demands that mothers devote all their time and attention to the needs and welfare of their children, and the second which suggests that, at least in the event of dissolution of marriage, motherhood is a non-event. To reconcile these ideologies depends upon recognition that the 'mother role' is attainable only within the framework of monogamous marriage for life, that it is inseparable from the separate spheres ideology, and that any woman who wishes to meet the demands of the 'mother role' bears responsibility for ensuring that, even given a legal regime which facilitates dissolution of marriage, and, not infrequently, even in the face of sustained brutality, she preserves the marital relationship. Should she choose to terminate the marital relationship, or should it be terminated by her spouse, she must be

29 Allen, *loc. cit.*, documents these shifts in the United Kingdom, in discussing the efforts by the 'Family Policy Group' to return responsibility for the elderly, the disabled, and children to 'the family'. He notes further that effectively this means returning the responsibility to women. See pp. 171-174.

30 This is particularly true in those jurisdictions, such as California and Australia, which have embraced the no-fault, divorce at will, model in its entirety. For an account of the egalitarian emphasis in the present Australian law, and of its inequalitarian consequences, see P. McDonald *et al*, 'Directions for Law Reform and Social Policy', in McDonald (Ed.), *loc. cit.*, 308-323. Of particular note are the presumptions of equality, the gender neutral language, and the complete absence of any presumptions as to the appropriate custodial parent. For a detailed discussion of the presumptions underlying the California model see generally Weitzman, *loc. cit.* Note especially the discussion in Ch. 11, Divorce and the Illusion of Equality, 357-401.

prepared to meet, or attempt to meet, the demands of the new egalitarian ideology. The only alternative is the marginal and wholly manipulable status of state client.

The egalitarian ideology of the family is an exceedingly recent innovation. It proclaims men and women persons in the eyes of the state and the law. Based upon the model of consensual relationships among individuals who are social, political and economic equals, this model assumes that men and women participate equally in the life of the community, that their opportunities are equal within it, and that, should they choose to form a family unit, the responsibilities and benefits will be equally shared. This model is tacitly assumed by contemporary accounts of distributive justice. An egalitarian ideology of the family which originated, at least in part, as part of the reform of family law has become a mirror for ideal social practice. The affective family, based upon egalitarian and mutually supportive and emotionally satisfying relationships among political, economic and social equals, is extraordinarily popular as a propaganda device, and, contemporary evidence suggests, rare as a matter of social practice. Many commentators have noted the dichotomy between social practice and legal reality. Weitzman comments at some length concerning the egalitarian, gender neutral language of contemporary law, and contrasts this with the reality of social, economic and family structures.³¹ Similarly, Funder notes that Australian divorced couples emphasize marriages with clear role differentiation and women assuming responsibility for the majority of household tasks. She comments that

*Australian marriages of both generations represented in this study seem to have quite traditional division of roles. Thus the observed differences in earning capacity, which are linked to wives' taking major responsibility for children and home, are likely to remain.*³²

While the present legal and theoretical³³ models tacitly assume an egalitarian model of family relationships, a majority of families are organized upon the basis that the husband makes a proportionally greater investment in his career and its advancement than he does in household tasks and in parenting, while the wife, whether or not she is in the paid labour force, makes a proportionally greater investment in household or family labour and in parenting. Allen speaking of intact families studied in the United Kingdom, makes similar observations. He notes the popularity of the theme of marriage as an egalitarian and symmetrical relationship, and comments that

31 Weitzman, *ibid.*, See particularly pp. 15-51 and 323-412.

32 See K. Funder, 'His and Her Divorce' in McDonald, *loc. cit.*, 224-240. The quoted passage may be found at p. 240.

33 If this assumption did not underlie contemporary egalitarian theories such theories would have been compelled to examine the connection between gender roles and economic and social equality and to offer an account addressing this prevalent form of inequality.

*such an ideology of marriage is a popular one, but there is very little evidence to suggest that it is in any real sense true. Despite the changes that are occurring . . . marriage remains an essentially unequal relationship, still structured around principles of male advantage.*³⁴

DWORKIN AND ASSOCIATIVE OBLIGATIONS

The points made in the section above will, I believe, become clearer and more readily accessible when we look at the ways in which contemporary egalitarian theory has addressed the family. In particular, we need to examine and deconstruct their references to families and the obligations within family structures and attempt to understand the assumptions upon which they are based. In what seems a paradoxical and remarkable shift of emphasis, egalitarian economic and political reforms are asserted to represent a political rendition of the ideal model of family relationships, an *ideal* in which individuals do not seek to advance themselves unless they can do so in ways which advance the interests of those close to them. While the ideal is never given concrete form or shape, it represents a significant background norm, or *assumption*, of such theories. Both the ground of obligation within the family and the basis for mutual trust among its members are often elided in analysis, although Dworkin is to some extent an exception in this regard. The model of family relationships tacitly assumed often seems to be the mother-child relationship, a relationship predicated upon natural inequality.³⁵ The protective and nurturing role of 'ideal motherhood', the mother's willingness to sacrifice her own interests to those of her children, undeniably represents a tempting model for an expanded bureaucratic social welfare state. Just as the mother, in ideal theory, guides and nurtures her children towards the mature state of adulthood, so the expanded social welfare state will empower its clients to attain mature equality.

Dworkin adopts an apparently unique approach, using the 'associative obligations' which he suggests arise within families and other biological and social groups as the foundation for his claim that certain sorts of political communities generate similar associative obligations. He argues that these obligations arise through social practice provided four conditions are met: the members must regard the group's obligations as holding uniquely within the group, they must accept that these responsibilities bind member to member - that is, apply *inter se* - rather than to the group as a whole, they must perceive these responsibilities as linked to a concern for the well-being of each of the members, and, finally, the members must believe that the practices of the group show equal concern for all members. Such groups he characterizes as fraternal, and he notes with respect to them that groups which meet these standards qualify

³⁴ Allen, *loc. cit.*, 21-23, 78-99. The passage quoted may be found at p. 79.

³⁵ Dworkin, *Law's Empire*, *loc. cit.*, 437, n. 20 discusses what he terms fraternal relations and refers explicitly to the parent-child and child-parent relationship as well as to the bond between siblings. He is particularly concerned with relationships in which mutual obligations are present but in which the element of choice is absent.

as 'true communities' rather than simply bare communities. For a fuller discussion of the distinction, see the balance of this chapter. I do not regard this as invalidating the more general description above, but simply expanding it.³⁶ The problem is not the use of the ideal family as a model, but the failure to submit our existing and historical practice of family to sustained critical examination and to incorporate that practice or those practices within the structure of the theory as a whole. If the ideal family offers a tempting foundation for egalitarian theorizing, the impact of existing 'non-ideal' families upon distributive justice ought to form an inherent part of the structure of accounts of distributive justice, not simply a footnote to them. We cannot assume an unexamined 'ideal' until and unless we make its roles and structures present to theory and their connection with equality unassailable.

Dworkin's reliance upon the non-voluntary obligations characteristic of family and similar practices in his account of the genesis of political obligations provides a particularly clear example of the use of the family as ideal. He argues that certain social practices generate obligations which arise, neither because of consent nor as a consequence of accepting benefits and thus incurring an obligation to respond in kind, but as a natural consequence of the relationships which prevail within them. Where the collective practices of the group meet the criteria outlined above, it is proper to speak of the members as having obligations *inter se* and such groups may be described as 'true communities'. The obligations are an integral part of the relationships which constitute the group. Archetypical among such associations are families. Several features of this model are significant. First, the critical element in Dworkin's account is the concern of each member for the well-being of other members of the community. Second, he emphasizes that not only must the members show concern for the well being of other members, but they must believe that the practices of the group demonstrate equal concern for the welfare of each individual member. The emphasis upon equal concern marks a significant departure from his earlier connection between equal concern and equal respect³⁷, at least in the context of obligations. His account links the concrete practices of social groups with the group's beliefs concerning whether these practices are predicated upon equality of concern. For obligations to arise, the members of the group must both have genuine concern for the well being of their fellow group members as individuals and believe that their social practices show equal concern. The language used suggests that it is the actual beliefs of the participants in the practice which are initially dispositive of the legitimacy or otherwise of the obligations perceived. Given that contemporary pluralist societies are comprised of numerous smaller associations, some voluntary, others wholly unchosen, and given that not all the voices within those groups are equally likely to be heard and listened to, are we entitled to critically appraise the beliefs of the participants and declare that some associations are incapable of generating obligations, or must we accept the sincere beliefs of the participants, or at least of

³⁶ *Ibid.*, 198-210.

³⁷ Dworkin, *Taking Rights Seriously*, *loc. cit.*, 180-183, 272-278.

those participants whose voices are heard? While Dworkin undoubtedly wishes to provide criteria by which the participants in any social practice may assess their own obligations, one by one, difficulties remain. These difficulties are inextricably linked to questions of power and the hegemony of prevailing stereotypes, particularly those which hold women responsible for sustaining relationships even while they simultaneously ensure that women lack the resources and the social power essential if they are to influence the structure of those relationships in any meaningful way. Likewise, when one considers social practices such as family, it becomes absolutely essential to recognize that children are unlikely to be able to accurately assess the validity of their obligations and to extricate themselves from relationships which are not sufficiently just to impose obligations. The consequences of Dworkin's model for relationships between *unequal* individuals remain wholly unexplored, and yet it is within the family that inequality prevails. Surely, most particularly where children are concerned, the onus cannot be on the individual to assess the capacity or otherwise of the relationship to generate obligations. Dworkin's failure to consider the position of children renders questionable some aspects of his account of associative obligations, perhaps suggests he may have considered insufficiently the position of the weak and disadvantaged more generally in developing his model.³⁸

The language actually used by Dworkin suggests both that it is the beliefs of the participants in the practice which are critical in evaluating the legitimacy of the obligations asserted and that these beliefs are open to critical evaluation from outside the practice itself. Thus he notes that '*even genuine communities that meet the several conditions just described may be unjust or promote injustice*'³⁹ either with respect to the members of the group or with respect to nonmembers. Should this occur, and should the defective features be compatible with the practice as a whole, a further question arises. Are the injustices so fundamental that the unjust obligations created by the practice are cancelled, or do they continue to subsist despite the injustice wrought? The fact that unjust obligations may continue to subsist emphasizes the need for attention to human relationships in constructing an account of distributive justice. Most particularly with regard to family structures and relationships, I would suggest, foreshadowing arguments to be developed in the next chapter, that even fundamentally unjust family structures can and do give rise to certain obligations, both between spouses and between parents and children, and these cannot simply be disregarded. We must take care, in the family as elsewhere, to distinguish between just and unjust obligations, to ensure that political institutions take their justice into account, strive to protect those who are, for whatever reason, unable to adequately identify and further their own interests. Family structures, and the inequalities implicit in existing structures, can neither be

³⁸ It must be noted in this regard that the individuals who figure in his accounts of civil disobedience more generally seem neither weak nor powerless, indeed, they are individuals who have the capacity and the will to challenge the decisions of the state. See Dworkin, *Taking Rights Seriously*, *loc. cit.*, 206-222.

³⁹ Dworkin, *Law's Empire*, *loc. cit.*, 202.

deleted from the theoretical agenda nor dismissed as individual or social preferences. The structure of our private lives is inseparable from our public equality.

The lack of structural analysis on Dworkin's part suggests, however, that the only relationships with which the state is concerned are those reflecting the public status of individuals as citizens. The equality of citizens is contrasted with the social and economic inequalities which attend differential professional or occupational roles. Social and economic inequality within the family is ignored. Because, as modern egalitarians have argued in different ways, social and economic inequalities do not depend upon morally significant differences between individuals, it is unfair to demand equal compliance with the rules and requirements of civil society from those who have no hope of receiving equal benefits. Yet if, as they also suggest, individuals act rationally - that is strive to satisfy their desires as they perceive them to the greatest extent possible, given the competing desires and interests of others - their willingness to accede to just distributive arrangements must be explained. The need for a rational basis for sharing necessitates reliance upon an ideal model of reciprocal obligations thus making it possible to argue that all would find it in their interests to support a distributive scheme which ensures that the benefits of social cooperation are fairly distributed. The model chosen is the family. In the family, says Rawls, individuals do not desire to advance their own interests at the expense of others. Rather, they strive to gain only in ways which advance the interests of other family members.⁴⁰ Well, yes, in *some* families, but it remains to do all the hard work. Who is it who here speaks? Who defines and establishes these interests? Are there power relationships involved? When decisions must be made, whose voice predominates and in what decisions? To what extent are the relationships involved willed and created by the individuals concerned, and to what extent are they also, and perhaps more significantly, themselves the products of legal and social changes, perhaps of the cultural environment as a whole? Without a concrete account of the ideal family and without an analysis of the place of the family in the basic structure and of the concrete entitlements of family members, Rawls' model of the ideal family lacks justificatory capacity *even as a model*.

Positing an ideal family while failing to make its structures and roles present, failing to subject the ideal itself to analysis, and crucially and centrally, failing to locate the family and individual family members within the structures and institutions, both legal and social, which predominate in the wider society, perpetuates facile acceptance of what is. This obscures the history, nature and characteristics of intra-familial relationships, and thus also obscures the ways in which family structures and roles mediate market participation and the ways in which market structures and demands mediate family structures. While this enables theorizing to concentrate upon the economic inequalities which arise through market competition, what is forgotten is that the cost is an inadequate and incomplete account of market structures, and a inadequate account of equality. When women are made the subject of discourse, and thus

40 Rawls, *A Theory of Justice*, *loc. cit.*, 105.

particularized, we are compelled to acknowledge that their economic inequality cannot simply be perceived as arising through market competition. Rather, their ability to participate equally in market competition is mediated by and through their familial roles, both as subjectively perceived and as ideologically constructed and imported into market practices. The present economic inequality of women reflects the meaning attributed in economic discourse to productive labour, and the exclusion of work done in a family context from this frame of reference.⁴¹

Discourse is both freed and expanded when woman becomes the subject of discourse, and a signal benefit of this expansion resides in its capacity to also make present the reciprocal connection between men's familial roles and market participation and demands. Surely an egalitarian discourse premised upon a more sophisticated and accurate model is preferable to one predicated upon an inadequate and simplistic model. It is not here argued that existing forms of discourse are, in any simplistic sense, patriarchal, nor is it suggested that the constricted forms of discourse currently prevailing have been consciously constructed. Rather, once the conception of the individual is deprived of concrete content, and, in particular, once his or her individuality is perceived without regard to those dependencies which reflect its embeddedness in familial, social and economic structures, not only is *'the family inevitably bracketed out of the civil conception of society'*, but also the structures and roles which pertain to civil society attain an unwarranted independence, and their perceived isolation from the world of private society makes coherent analysis unlikely.⁴²

While modern egalitarians are undoubtedly committed to eradicating the last vestiges of ascribed status upon the basis of race, caste, ethnic origins and religious belief, to the degree that they ignore the economic and political relationships within family groups and, in particular, the historically determined liberal equation of legitimate status with occupational and professional status and its concomitant denial of public individual status to those individuals who are not members of the productive labour force, they render their own project untenable. The ideal family may well provide the theoretical model for the egalitarian social welfare state, but the possibility of power relationships within families and the unequal positions of adult family members have been rendered invisible by this same ideal and by the accompanying ideological definition of the family as private. The conception of the individual which prevails in contemporary egalitarian theory - despite the efforts of contemporary theorists to affirm it as a political conception merely - a conception devoid of specific and non-specific dependencies, parallels the conception of economic man, and these together are/ought to be devoid of constraints other than those which emerge from the laws of the liberal state

41 On the construction of economic discourse, and on the way in which, internationally, the labour of women is comprehensively excluded from conventional economic indicators, see generally Waring, *loc. cit.*

42 See Yeatman, *loc. cit.*, 155-163, especially 155-158. The passage quoted may be found at p. 157.

and the functions and/or malfunctions of the economic market. As liberal citizens and liberal market actors equality becomes attainable.

Because, as abstract citizens, equality before the law is a precondition for the legitimacy of the rule of law, and because as economic actors whose morally irrelevant differences are mitigated by the social welfare state, each stands for one and no more than one, the postulated coexistence of political and economic equality and hierarchical structures must be explained. Dworkin seeks to reconcile fraternity and hierarchy, commenting that while fraternal associations must be conceptually egalitarian,

*they may be structured, even hierarchical, in the way a family is, but the structure and hierarchy must reflect the group's assumption that its roles and rules are equally in the interests of all, that no one's life is more important than anyone else's. Armies may be fraternal organizations if that condition is met. But caste systems that count some members as inherently less worthy than others are not fraternal and yield no communal responsibilities.*⁴³

There is a muddle here about the voices within the army, just as there is a muddle about the voices within the family.⁴⁴ The phrase 'the group's assumption' conceals everything we need to know about the ways in which that assumption came into being, the voice or voices which

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See Dworkin, *Law's Empire*, loc. cit., 200. But here perhaps one must ask if we *can* imagine a caste system in which all the participants sincerely believed (or assumed) that the roles and rules prescribed thereby were equally in the interests of all, in which the group believed that its practices did, in fact, show equal concern. Walzer suggested we might, and was savagely criticized by Dworkin for doing so. See Walzer, loc. cit., 26-28, 312-315, cf. Dworkin, 'What Justice Isn't' in *A Matter of Principle*, loc. cit., 217. What Walzer in fact asked us to do was to 'assume now that the Indian villagers really do accept the doctrines that support the caste system' [Emphasis mine.] in order that he might explore what might follow from that assumption. Given that *assumption*, while in Dworkin's terms a caste system would not be just, ie. its conception of equal concern might be defective in some way, it need not follow that a community organized upon that basis was not a genuine community, one with shared conception of equal concern, at least if Dworkin is prepared to extend the same logic to a caste system as he does to a patriarchal family. Cf. *Law's Empire*, loc. cit., 202-206. Why ought it make a difference that the shared assumptions in a caste system are in practice attended by differential entitlements while the shared assumptions in a patriarchal family superficially appear only to be attended by differential levels of protection, by paternalism which appears appropriate when applied to women and girls and inappropriate when applied to men and boys? The precise thesis for which I have argued is that the overall entitlements of women (and girls) remain less than equal precisely because of their familial roles and the economic inequalities attendant upon those roles. Would it make a difference if Dworkin had, instead, imagined a family in which boys and young men were subject to stringent parental constraint upon the basis that due to the predisposition of young men to violent behaviour special protection was required until they were sufficiently mature to control their violent impulses? While, so far as I know, no existing families are organized upon this basis, there is at least some empirical evidence to support the argument that men and boys are more likely to resort to violent behaviour and therefore such constraints, in our culture, might well appear wholly reasonable and grounded in empirical evidence.

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I think here of MacKinnon's comment that the different voice perceived by Gilligan is simply the voice of the oppressed, and her further comment that oppression has the capacity to silence the oppressed. *Feminism Unmodified*, loc. cit., 39.

established the roles and rules involved, the specific and historically constructed ideologies which played a part in their creation, and the voice or voices which make that assumption present to us. To assume, on an individual level, is to take as given, thus obviating the necessity for critical analysis. What does it, can it, then mean to be told that a group assumes, in particular that it *assumes* that its roles and rules are equally in the interests of all? What is involved in what Dworkin acknowledges to be a personification?⁴⁵

The concept of the personification of a social group is a critical structural element in Dworkin's account of the nature of political obligations and his argument for law as integrity. For Dworkin, integrity is a shorthand reference to the complex idea of law as a coherent and consistent set of principles which functions as an integrated whole. This conception of the nature of law, he argues, demands personification in that it supposes that

*the community as a whole can be committed to principles of fairness or justice or procedural due process in some way analogous to the way particular people can be committed to convictions or ideals or projects.*⁴⁶

He insists that the community is not an independent metaphysical entity, that insofar as it 'exists' it exists as a function of the practices of thought and language characteristic of the group. He argues that personification expresses the responsibility of the group, our sense that the group itself must be taken seriously as a moral agent. This remains

*a personification and not a discovery, because we recognize that the community has no independent metaphysical existence, that it is itself a creature of the practices of thought and language in which it figures.*⁴⁷

The examples given involve corporate responsibility and the responsibilities of political officials. We think it proper to speak of corporate responsibility for torts or crimes, not as a shorthand way of summing up the responsibilities of individual employees, shareholders or managers, but as part of a form of reasoning which commences with considering the responsibility of the corporation as a whole and only subsequently considers the degree to which that responsibility devolves on individual actors. Personification provides us with a vantage point from which to consider the responsibility of group members.

Similarly, Dworkin argues that our political convictions assume that the community has principles of its own to which it may be faithful or unfaithful. In a complex argument he suggests that when a community has betrayed its principles, as Germany did during the Nazi era, whilst contemporary Germans are not to blame for the Nazi era, they nonetheless may

⁴⁵ Dworkin discusses the conception of personification upon which he relies in some detail in Dworkin, *Law's Empire*, *loc. cit.*, 167-175.

⁴⁶ *Ibid.*, 167.

⁴⁷ *Ibid.*, 171.

have special responsibilities today because the Nazis were also German. The concept of personification explains our intuitions in this regard. Similarly, we conventionally speak of the responsibilities of government towards its citizens, arguing that, as citizens, we have a right that the government protect us against assault or provide adequate medical care to all. Dworkin suggests that arguments concerning the existence of such responsibilities precede consideration of how they might be institutionally met. Our belief that the government personified has such obligations provides the foundation upon which beliefs concerning the particular duties of political officials depend. With respect to the latter, he comments that most of us

*think they have a special and complex responsibility of impartiality among the members of the community and of partiality toward them in dealings with strangers. That is quite different from the responsibility each of us accepts as an individual. We each claim a personal point of view, ambitions and attachments of our own we are at liberty to pursue, free from the claims of others to equal attention, concern and resources. We insist on an area of personal moral sovereignty within which each of us may prefer the interests of family and friends and devote himself to projects that are selfish, however grand.*⁴⁸

Personification explains the perception that, as members of particular communities or associations, individuals have obligations towards their fellow members which are inexplicable on an individual level. The concept of the community personified emphasizes the identity of the social group as moral actor.

The concept of personification in Dworkin's theory is complex and significant. It grounds his account of associative obligations. As he recognizes, the associative obligations he postulates as the basis of political community depend upon '*a history of events and acts that attract obligations*'⁴⁹ rather than upon any discrete act of deliberate contractual commitment. Obligations are the outcome of a relationship, not a condition precedent. They are embedded in the concrete history of the group and defined through its practices. Their nature and extent may well be controversial, but, according to Dworkin, what is sought is that interpretation which makes a given practice the best it is capable of being.⁵⁰ Interpretation occurs on three distinctive levels, the preinterpretive level, where what is required is consensual identification of the particular practice, the interpretive level which consists of a general justification for pursuing the particular practice in question, and the postinterpretive level, in which the '*interpreter adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage.*'⁵¹

48 Dworkin, *Law's Empire*, loc. cit., 174.

49 *Ibid.*, 197.

50 Dworkin, *Law's Empire*, loc. cit., 45-86.

51 *Ibid.*, 66. In Ch. 6 I endeavour to apply this model to family practices.

Here, it is critical to draw together the threads of a lengthy and complex discussion and to relate them to the arguments presented earlier in this and the preceding chapters. The practices central to the arguments presented thus far are those of political community and family. We have begun to examine the interpretations given of these practices in both early and contemporary liberal theories, and have attempted to draw out the interdependence of political practices and familial practices. It has been argued that the structural roots of women's inequality may be found in our cultural practices of family and in the gender roles which have evolved coevally with those practices. It has been argued further that to the extent that theories of distributive justice limit their analysis to the inequalities which arise out of market competition and out of political practices, whilst disregarding family practices, women's inequality will continue to be absent from the theoretical agenda. Even though women remain the least advantaged segment of the population at every socio-economic level, even though gender inequality remains more or less constant across the barriers of class, race, and ethnicity, and arises out of our cultural traditions, the compartmentalization inherent in current accounts renders it invisible. It has been argued further that such theories are themselves profoundly gendered, that the conception of the person relied on mirrors the male gender role characteristic of our culture and that the structural assumptions governing this role as an ideal prefigure the arguments presented. It is against this background that Dworkin's conception of associative obligations becomes profoundly significant and relevant and it is this background which necessitates its exploration in substantial depth in this and succeeding chapters.

When Dworkin tells us that an essential determinant of the capacity of a social practice such as family or political community to generate obligations is the *group's* assumption that its roles and rules are equally in the interests of all those within the group, he is relying upon personification to make real the idea that a social practice is capable of generating assumptions which belong to the practice as a whole and not to any individual member as individual. There are so many questions one might wish to ask here. Do our practices of family qualify in the sense his account requires? Does it matter that, for example, many of the voices within the family have gone unheard, that others may have been profoundly distorted? Does it even matter that the group's assumption may ultimately be nothing more or less than the assumptions of those who have, traditionally⁵², been entitled to exercise power within the family and who believe their power in this regard to be both legitimate and genuinely to manifest equal concern for the interests of all family members? Doctrines such as inequality of bargaining power, unconscionability and unjust enrichment have come to matter profoundly in contract law, and these doctrines emphasize that even in a relationship where bargaining ostensibly occurs at arms length we cannot simply assume that authentic mutual consent exists. Are we somehow *less* entitled to question the assumptions underlying practices such as family?

Surely authentic mutuality and equality are still more critical within foundational and pervasive social practices such as family. Where is the ideal account of family we require to make his model real to us?⁵³

According to Dworkin, such associations need not be egalitarian in any readily accessible sense to generate obligations. In theory at least, family practices such as those characteristic of the 'separate spheres' ideology characteristic of early social contract theory would qualify provided that the responsibilities involved were perceived as owed uniquely to family members, that they were owed *inter se* rather than to the family as a whole, that the specific responsibilities identified flowed from a genuine concern for the well-being of each individual member, and finally that the concern was extended equally to each individual, whatever his or her specific role within the within the family. The assumptions emerge from the complex interaction *between the historical development of a particular practice and a critical interpretation of that practice*. Dworkin emphasizes that to interpret the requirements of a particular practice, the interpreter '*must join the practice he proposes to understand*'.⁵⁴ It follows that in order to properly interpret our culture's practices of family or of political community, it is necessary to enter into the role or roles the practice makes available. This step is essential if we are to determine what the practice actually requires seen in the best light and ascertain the degree of fit required between the present features of the practice and the justification offered for the practice itself. Even this, Dworkin acknowledges, may ultimately be insufficient, for although we have thus established the integrity or otherwise of the practice, we have not answered the quite separate question of whether or not the practice is just.⁵⁵ Dworkin acknowledges that even authentic fraternal associations may be unjust, that

*unjust dominion [may lie] at the heart of some culture's practices of family [and that] even the interpretive attitude [may not] justify reading some apparently unjust feature of an associative obligation out of it.*⁵⁶

⁵³ See Ch. 6 for an attempt to construct an ideal theory account of marriage and family using Dworkin's interpretive model and for arguments that many of the family practices of our culture are illegitimate on the best interpretation available of our practices of family. I argue further in that chapter that, given the relationship of the state and the family, the degree to which the family has served in the past and serves in the present as a agent of social control, the state has an obligation to intervene where practices are unjust.

⁵⁴ Dworkin, *Law's Empire*, *loc. cit.*, 64.

⁵⁵ I should add that, unlike Dworkin, I am uncertain whether, in the case of family practices, a clear distinction can be drawn between the justice and the integrity of a social practice. In Ch. 6 I argue, in essence, that for the practices associated with family to retain sufficient integrity to ensure their capacity to impose obligations they must also be just.

⁵⁶ See Dworkin, 'Is There Really No Right Answer in Hard Cases' in *A Matter of Principle*, *loc. cit.*, 119, 139-141.

When we deal with complex and structured practices, the sorts of practices which are characteristic of associative communities of the type Dworkin describes, to become a participant necessarily means to participate in its structure, to enter into one of the roles it makes available, together with the emotional and structural associations defining that role. We are not dealing with an exercise of the kind Dworkin uses as a model of literary interpretation, one in which it is (barely) possible to consider the participants simply as abstract individuals, but with a complex and hierarchically structured practice organized around distinct social roles. If our critic fails to become a participant, as Dworkin puts it, he or she will be unable to provide an interpretation of the central conceptual features of the practice. If our critic becomes a participant, he or she can only do so through an *interpretation* of one of the roles associated with the practice, and within the *assumptions* governing the structure of that role. What our critic perceives upon resuming a position outside the practice itself, outside the associative community in which it features, cannot but be a function, at least in part, of the position adopted within the practice. It goes without saying, of course, that what our critic finds within the practice itself, and the particular form of participation available may be determined in part by who, in particular, he or she is. Within our culture (any culture?) to adopt the interpretive attitude towards practices as constitutive of our identity as those involved in family we must draw upon our own experiences of selfhood, of our identity as male or female, as (potential or actual) husbands or wives, mothers or fathers, daughters or sons, brothers or sisters. In seeking to imagine, to intuit enough of the significance of such practices to be a competent critic, we confront an immediate barrier. Do we, can we, understand enough of what it is to be other than we are to become competent interpreters?⁵⁷ I do not believe, I should add, that Dworkin would necessarily disagree with this account of the difficulties involved. These difficulties become crucial at the point at which, in interpreting a

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The fact, or mystery of femininity, has become a significant, almost mainstream, problematic in criticism. See, for example, S. Cavell, *Themes out of School: Effects and Causes*, San Francisco, North Point Press, 1984. He alludes the demand for explicitness inherent in the social contract, and comments that the '*consent to be governed must express the desire to be governed, governed by consent, hence to participate in the city. To express desire inexplicitly is an act of seduction, hence one that exists only in a medium of prohibition and conspiracy. It may be that human sexual life will continue to require this medium and its struggles for the foreseeable future, say for as long as our politics does not create a more perfect public medium, unfailingly intelligible, reciprocal, and nourishing. Without this, we will continue to interpret privacy as inexplicitness, and on this ground the private will continue to look like the natural enemy of the political. . .*' See pp. 94-95. Later he comments upon the fact that Bergman has been credited with being the first modern filmmaker to confront and question the feminine in himself and asks if certain scenes in a filmic deconstruction of a Bergman film constitute an admission that we [who?] '*do not know what a woman, in oneself or others, is.*' See pp. 119-120. At p. 179, again in reference to Bergman, he identifies *Persona* as signifying '*a man's imagination of the imagination of women, or perhaps a man's compulsion to imagine the imagination of a woman.*' Finally, and I believe significantly, Cavell identifies the quality or possibility of being photogenic with the possibility of femininity in oneself (pp. 180-181), that is, as I read the passage, with the willingness to become or the possibility of becoming an object to subjects other than oneself. More generally see Betterton, *loc. cit.* for a series of essays upon images of femininity in the arts and media.

practice such as family, we attempt to ascertain whether or not the group *actually assumes* its roles and rules are equally in the interests of each individual member. If, as seems likely, none of us, male or female, have any experience of selfhood or individual identity which is not gendered, and, equally likely, are not fully conscious of the role played by gender in our interpretations, such difficulties become critical in the interpretation of any social practice whose internal structure relies upon gender as a major determinant.⁵⁸

The demands of the critical role are heightened where the text to be interpreted touches that which is believed constitutive of our identity as individuals, not merely peripheral to it. When reflecting upon Dworkin's acknowledgement that some culture's (our culture's?) practices of family might be unjust, we must reflect as well upon his acknowledgment that it may be that the injustice is '*so severe and deep that these obligations are cancelled*'. He suggests that practices involving racial unity and discrimination provide examples where this is likely to be the case. But, he adds, this will not always be the case, and where it is not, dilemmas arise because '*the unjust obligations the practice creates are not entirely erased*'. He then turns to the example of a family in which daughters, but not sons, have an obligation to defer to their father's wishes in the choice of a spouse. While I see no reason why practices involving racial unity and discrimination ought to be perceived as more profoundly unjust than family practices which deny some individuals the autonomy to which other individuals equally placed in all respects but the brute fact of biological sex are entitled, it is worth looking at his example and attempting to understand why it was selected. Dworkin begins:

Does a daughter have an obligation to defer to her father's wishes in cultures that give parents power to choose spouses for daughters but not for sons? We ask first whether the four conditions are met that transform the bare institution of family, in the form this has taken there, into a true community, and that raises a nest of interpretive questions in which our convictions about justice will figure. Does the culture genuinely accept that women are as important as men? Does it see the special parental power over daughters as genuinely in the daughter's interest? If not, if the discriminatory treatment of daughters is grounded in some more general assumption that they are less worthy than sons, the association is not genuine, and no distinctively associative responsibilities, of any character, arise from it. . . .

But suppose the culture accepts the equality of sexes but in good faith thinks that equality of concern requires paternalistic protection for women in all aspects of family life, and that parental control over a daughter's marriage is consistent with the rest of the institution of family.

Under such circumstances, he argues, the obligations of community continue to exist, although they may be overridden by appeal to some other more general ground of rights.⁵⁹

58 Similar difficulties may arise in the context of race or ethnicity, although individual awareness of such differences almost certainly arises later than does awareness of gender.

59 See Dworkin, *Law's Empire*, *loc. cit.*, 204-205.

The distinction at work in this argument, that between the situation where the injustice is so great that the obligations which would otherwise follow are cancelled and that between the case where these obligations continue but may be overridden appears to be linked to another distinction made earlier. In acknowledging that even genuine communities may be unjust, Dworkin notes that communal obligations may be unjust in two very different ways. The injustice may be confined to the obligations pertaining within the group, as in the example above, or it may flow outwards to those who are not themselves members of the group. If the latter is the case, the unjust obligations will conflict with obligations arising out of membership in other, wider, communities. Racially exclusionary practices implicit in the practices of some communities may therefore conflict with obligations of neighbourhood or citizenship.⁶⁰ Similarly, family practices may be objectionable, not simply because of their paternalism, but because they require members to commit crimes to protect family honour or otherwise serve family interests.

Again, many questions arise. Surely patriarchal practices of family, the kind of paternalism described, also flow outwards, affect the attitudes and behaviours of family members in the workplace, the community, in politics.⁶¹ Why is it that Dworkin, in seeking to identify family practices sufficiently unjust to cancel obligations, finds it necessary to draw upon families whose members are compelled to commit crimes in the name of family honour? From what, precisely, has he averted his gaze? Can he possibly believe that, for example, a father who sincerely believes that equal concern requires paternalistic protection for girls and women in all areas of family life can or will confine those attitudes towards girls and women to the family setting? What of his relationship in the workplace with women as colleagues, possibly as superiors, more likely as subordinates? How could he reconcile a sincere belief that girls and women require paternalistic protection in all aspects of family life with, for example, the loyalty and respect due a superior in the workplace, with the mutuality and equality due a colleague, even with the encouragement and challenge essential if a subordinate is to attain her full potential? In simple terms, I believe, the short answer is that his own example is flawed, that there is no reason to assume that such attitudes such as those described will not corrupt and render fundamentally inegalitarian the participation of the individuals involved in other spheres.⁶²

It seems likely that where the injustice is confined to a specific feature of the relationships within the practice, Dworkin would like to argue that the responsibilities which arise are genuine, although the offensive obligation may be overridden by some more general

⁶⁰ *Ibid.*, 202.

⁶¹ See, for example, C. Cockburn, 'The Gendering of Jobs: Workplace Relations and the Reproduction of Sex Segregation' in S. Walby (Ed.), *Gender Segregation at Work*, Stony Stratford, Open Univ. Press, 1988, 29.

⁶² For further arguments on this point, see Ch. 6 & 11.

principle. Where the injustice is global, where it not only affects the roles and relationships within the group, but *subverts* the capacity of its members to fulfil other obligations, the practice itself is unjustifiable and ought not be tolerated. The subjectively perceived obligations of its members are cancelled, and the practice itself must be changed or eradicated. If I am right in this, are we then to abolish the family, or at least those families whose practices remain similar to these, as Rawls fears? Are we to intervene directly, alter the offensive practices? *I believe that we must, and that the extent to which such intervention is morally mandatory has not been fully recognized by Dworkin.* Many practices similar to those Dworkin cites remain both conventional and accepted within a wide spectrum of contemporary families. What of families in which the family members sincerely believe that the husband is entitled to expect obedience from his wife as well as his children, where the hierarchy involved is clear and explicit, even if such practices are, at the same time, sincerely believed to be compatible with equality of concern? Dworkin offers little in the way of direct guidance here, seemingly assumes that family practices such as those described either will not interfere with the capacity of family members to fulfil other obligations or, perhaps, that the interpretive attitude will demonstrate that the practices concerned are inconsistent with the institution of family as a whole. The first assumption is, I think, simply wildly implausible, the second profoundly difficult to sustain given our legal and social history and traditions. They seem all too consistent with our actual practices of family as they have evolved over the last several hundred years, even while they may be *wholly* inconsistent with the 'best interpretation' we can provide of these practices.⁶³ This possibility, of course, raises further questions, questions which involve the responsibility of a state dedicated to equal concern in addressing private practices which are inadmissible on egalitarian grounds and these will be addressed in subsequent chapters.

The passages above are difficult for several reasons. First, remarkably for a modern theorist, Dworkin is suggesting that associative obligations, to the extent that they are called into being by a social practice sufficiently coherent to meet the requirements of what he terms 'true community', operate in the same way in families, racial or ethnic communities, and modern nation states. Likewise he acknowledges that questions of justice can arise within families as within wider communities. It makes no sense to characterize a feature of particular family structures as unjust unless justice is as relevant within families as elsewhere. To that extent, he may be taken to acknowledge that the personal may be political. Equally, like Rawls, he wishes to insist that his account of equality is a political account, that our responsibilities as private individuals and as citizens are distinct. As he says subsequently,

our familiar convictions, which require government to treat people as equals in the scheme of property it designs but do not require people to treat others as

63

For a sustained argument that they are, however, inconsistent with the best interpretation of family that can be provided, see Ch. 6. It should be noted that interpretation I offer involves condemning many deeply embedded cultural traditions as inequalitarian and inadmissible within an egalitarian state.

*equals in using whatever the scheme assigns them, assume a division of public and private responsibility. They suppose we have a duty in politics that does not carry over as any general duty of private life.*⁶⁴

The question which remains both unasked and unanswered in Dworkin is simple and critical to egalitarian theory. Under what circumstances does 'private' injustice become relevant to 'political' justice? Dworkin has drawn upon an analysis of 'private' obligations in constructing his account of the nature of political obligations, has argued that specifically political obligations arise in the same way as do obligations within families, among friends, within workplaces and so on. Both the argument, and the distinction between unjust obligations which may be overridden by appeal to a wider principle and unjust obligations which are simply cancelled, while developed in the private context, clearly are intended to provide the structural elements essential for a reasoned account of civil disobedience and for an argument suggesting that some states are sufficiently unjust for there to be no political obligations, although, of course, citizens may well continue to obey the law out of prudence.⁶⁵ Where the claims of conscience demand disobedience to a particular law out of obedience to a higher principle, it is proper to speak of overriding. The citizen remains bound by the other obligations of citizenship, and has something to regret. He or she owes to the political community

*an accounting, and perhaps an apology, and should in other ways strive to continue [his or] her standing as a member of the community [he or] she otherwise has a duty to honor.*⁶⁶

I would add that this obligation must not be interpreted as unilateral. Surely the demand for an accounting must be seen as bilateral. Where the injustice is global, as has been the case with respect to the black community of South Africa, Dworkin may believe that it is improper to speak of obligations subsisting at all. Given that black South Africans have been excluded in almost every relevant sense from participation in that community, I imagine Dworkin would want to say that South Africa is a bare community merely, that neither white nor black South Africans have any obligation to obey the law. They may be obliged to do so, but that is very different.

This very willingness to seek the nature of political obligation and legitimacy in the context of social life generally, raises further questions concerning the legitimacy of political intervention in the private sphere. Just as Dworkin reasons from the bottom up in offering an interpretive account of political obligation we must begin to reason down, ask to what extent do the demands of equality as a principle of political organization mandate political

64 Dworkin, *Law's Empire*, loc. cit., 299.

65 Many wives, of course, continue to obey their husbands for precisely the same reason.

66 Dworkin, *Law's Empire*, loc. cit., 205.

intervention directed at mitigating or eradicating the inegalitarian practices which continue to prevail in the smaller associative communities which comprise the nation state. To the extent that issues of justice and injustice arise within families, irrespective of whether such injustice is, in his terms, sufficient to erode the ground of obligation altogether, under what circumstances is the state either entitled or obliged to intervene, if it is truly dedicated to equal concern?⁶⁷ Intervention would appear to be mandated in the event of communities evincing racially or ethnically discriminatory practices, be these communities political communities within the state or smaller, more 'private' associations. Equally, perhaps, discrimination upon the basis of gender may become part of the public agenda with respect to professional associations or clubs. In both cases state intervention would arise from the demands of those excluded, those seeking to be accepted within the community.

What of the family? Surely, in the example given, the point lies in the potential of the injustice to cripple the development of some members of the family, to narrow, perhaps to extinction, the sphere of autonomy to which a daughter might otherwise be entitled and to which she might otherwise subjectively perceive herself to be entitled. It does not go too far to suggest that, in unjust families, those most likely to be harmed by practices which fail to meet the demands of justice are those who are most vulnerable, the children (and often the women) who are wronged thereby, and, it must be recalled, they are also those least able to assert and defend their own rights. The real question is not whether obligations within unjust families continue to subsist, even in attenuated form. Whether or not, as a matter of theory, they continue to exist, as a matter of practice they are believed to do so, and, indeed, the same may be true in political communities such as South Africa or, for that matter, ancient Athens. Dworkin does offer one example of a family so seriously unjust as to generate no obligations, one in which the family compels its members to participate in criminal acts against outsiders.⁶⁸ Yet this example advances us no further, does not even present a 'hard case'. The hard cases involve injustices already pervasive in Western society, spousal abuse, both physical and psychological, child sexual abuse, patriarchal families, instances where the injustice arises because of the type of community created among family members. If such families are bare communities, families by convention or by the rule book merely as Dworkin's account suggests, the statistics cited in the first chapter suggest that between one third and one half of American families certainly cannot be called true communities. Even within profoundly abusive families, family members often perceive themselves as obligated to one another as do wider social institutions, including governmental authorities.⁶⁹ Rather, given the admission that issues of

67 For a sustained argument that the state ought itself be perceived as male and structured around principles of male advantage see C.A. MacKinnon, *Towards a Feminist Theory of the State*, Cambridge, Harvard Univ. Press, 1989.

68 *Ibid.*, 205.

69 Even in a profoundly abusive marriage, a mother may perceive herself as having an obligation to her children, for example. Indeed, her obligation to her children may

justice arise within families as elsewhere, to what extent, and for what reasons, ought the state and its authorities be prepared to turn a blind eye towards injustice where it exists? These questions are difficult in part because, with respect to the family, outsiders are unlikely to be involved until the family has been defined as marginal. Here, demands for inclusion, for membership, tend to be attenuated.⁷⁰ Equally, of course, the mere fact that family members authentically believe in such practices, and indeed, the fact that they may well perceive such practices to be just as among themselves, does not alter the situation. In Dworkin's terms, just as he is disposed to argue that slavery might be unjust, irrespective of whether

*people think it unjust, or have conventions according to which it is unjust, or anything of the sort, but just because slavery is unjust,*⁷¹

one may argue that certain practices within families are, for the same reasons, unjust, that this represents a 'moral fact', one which exists irrespective of whether they are thought to be unjust. Family structures pose particular problems, not because the injustice within them is in any way remarkable or unique, but because our cultural practices identify them as private, and this privacy shields them against intervention so long as and to the degree that they outwardly conform to the ideal of the middle class, male-headed nuclear family.

Yet even given Dworkin's remarkable willingness to acknowledge family relationships, at least briefly, and to suggest that the genesis of obligations within family relationships (and, indeed, within other micro-communities) is analogous to the genesis of political obligations, his treatment of the family is deficient. First, as noted earlier, it appears more a marriage of necessity than an indication of his willingness to come to grips with the interaction of family structures with other social, economic and political structures. Second, his acknowledgment that questions of justice may arise with respect to relationships within the family, and not simply in the context of its relationship with outsiders, ought to have led him to reconsider the nature and function of the prevailing public/private distinction. Third, by his apparent acceptance of the liberal political equivalent of the separate spheres ideology, the assumption that family roles are discrete, private, unique to the family and in normal circumstances irrelevant to the wider political and economic context, he blinds himself to the ways in which these mediate the participation of the individual in other realms. The very discreteness of the injustice in his example is illustrative. In such a culture, at least with respect to the contemporary versions which I have encountered, it is not merely that women are perceived to

induce her to remain, both because she cannot survive on her own and because she may believe that her children need a father. Are we to say she has no obligation to her children? Her interpretation may be deficient, but I would suggest her obligation is real. Are we to redefine the relevant community, *even if a profound and significant reason for her remaining within an abusive relationship is her obligation to her own children?*

⁷⁰ Where a daughter has broken free and married a man of her own choice he may demand the same acceptance from her family as she enjoys from his.

⁷¹ See Dworkin, *A Matter of Principle*, loc. cit., 138.

require special protection in all aspects of family life. The same assumptions which mandate special protection within the family also alter the character of the participation of *all family members* in education, in economic life, in the social life of the wider community. They affect freedom of movement, independence, the whole range of options available. They also, and inevitably, affect attitudes towards others, whether within the home or within civil society. A culture in which the sole restriction applied to the choice of marital partner would be a strange culture indeed. Social practices are rarely so discrete and compartmentalized. If obligations within the family differ in no material way from obligations within political society, if our lives are cut from whole cloth and not fragmented into discrete and compartmentalized roles, then family structures and relationships ought to be present in every aspect of his account of the demands of equality, whether in terms of resources, in terms of liberty, or in terms of politics. Admittedly, his way is much simpler, yields a more economical account, but its economy is purchased at the cost of inaccuracy.

THE BASIS OF THE MARITAL RELATIONSHIP IN LIBERAL THEORY

INTRODUCTION

In the last chapter we began to examine the relationship between familial ideologies and the structure of liberal political theories. We noted that contemporary egalitarian theories have relied, at least to some extent, upon an ideal conception of the family in developing their arguments for, in the case of Rawls, distributive justice, and, in the case of Dworkin, the nature of political obligations. We noted as well that despite the shadow or trace of an account of family relations in their texts they endeavour to insist that their liberalisms remain political merely, are concerned with relationships among citizens and between citizens and the state. In this chapter we will begin to explore the treatment of marriage in liberal theories and make use of the theoretical resources provided by Rawls and Dworkin to attempt to construct an account of marriage which is consistent with their theoretical structures as a whole.

Even if the ideology of the traditional family is taken as a starting point, its public face remains difficult to characterize. The conventional approach suggests that marriage is contractual. Blackstone explicitly treated the civil face of marriage as contractual.¹ Hobbes, Locke and Kant all emphasized the contractual nature of marriage. Rousseau adopted no concluded view on the matter, although in his paeans to the patriarchal household he came close to characterizing marriage as wholly affective.² Even in early social contract theory, however, if marriage was contractual, it certainly was not an ordinary civil contract. As a contract it was almost unique, invariably one in which one party, the wife, ceded her liberty and her independent identity to the other, the husband. It does not go too far to suggest that, to the extent marriage was perceived as contractual by early liberals, it had from *their* perspective only one true parallel, the 'social contract' by which men became members of the state. Women, that is, became wives by ceding their natural liberty to their husbands just as men became citizens by ceding their natural liberty to the state. Women became thereby entitled (at least in theory) to the support and protection of their husbands, to that which pertained to their status as wives, just as men, through the social contract, became entitled to protection for their persons and property and to their public status as citizens.

Against the background of early social contract theory, characterizing the marital relationship as contractual in the sense specified above made perfect sense. Given a theoretical construct in which men were described as exchanging their natural liberty for protection against their fellows and for secure ownership of all they might acquire, a parallel

¹ See Kerr, Vol. 1, *loc. cit.*, 404.

² See Rousseau, 'Discourse on the Origin of Inequality', *loc. cit.*, 211. Cf. C. Pateman, 'The Shame of the Marriage Contract' in J.H. Stiehm (Ed.), *loc. cit.*, 69-97. For a contractual view of marriage see Hamilton, *loc. cit.*, 35-37.

marital contract served a number of distinct and critical purposes. Just as the social contract provided a firm foundation for order and authority within the state, given the basic presumption of equality, of the absence of any natural title to rule, the marital contract provided a firm foundation for order and authority within the household, again in the absence of any natural title to rule.³ Because every marital contract was identical, each citizen having equal title to rule within the household, his marital rights were of the same structural character as his other proprietary rights and might, therefore, be enforced against other men in the same way. In this way, the marital contract provided a firm foundation for family privacy. His authority as husband together with the proprietary nature of the rights acquired through the marital contract ensured that family relationships remained, under normal circumstances, outside the intervention of the law, preserving to each citizen a sphere of individual liberty.

The marital contract offered an easy and obvious explanation for the exclusion of women from the bonds of civil society, of fraternity. If the social contract made men citizens, marriage made women wives. Because men were citizens, because they must be subject to law and not to the vagaries of other men, and because they, as well, were parties to the marriage contract, it was logical, indeed essential, that the terms of marriage be established by the state, that they be identical for all citizens.⁴ The same belief in the arbitrary and conflicting wills of men which necessitated entry into the social contract also demanded that marriage be regulated, not by individually negotiated agreements between husband and wife or by family arrangements negotiated by parents but by clear public laws which established the limits of the husband's authority over his wife and children and ensured that his power would remain within bounds, thus *legitimizing* both his authority as husband and father and its exercise. Taking early social contract theory on its own terms (as it must be taken if sense is to be made of it) this identified civil society as the domain of equals, of men whose status was that of citizen. All citizens were equal, both before the law and within their own households, shared a common status. The independence of citizens was affirmed and protected. The status of women and children was established by their relationship to citizens. They remained outside the formal equality of civil society, existed in what is best perceived as a limited state of nature under the protection of citizens who were themselves governed by the rule of law, and whose power over their wives and children was itself limited by law. Both women and children became thereby the property of male citizens, providing an almost unassailable foundation for family privacy.

Today, of course, this account of family relationships has become profoundly difficult. Women have full status as citizens. From the perspective of the state, their other relationships ought to be irrelevant to the rule of law. They ought to be fully members of civil society in precisely the same way as men. This change has rendered problematical what under early

³ See Ch. 7 for a discussion of how, invariably, women ceded their natural freedom to men in the marital contract and why men found the social contract essential.

⁴ Cf. Locke, *loc. cit.*, 362-67 and Hobbes, *loc. cit.*, 253-55.

social contract theory seemed tight, logically structured, and inevitable. Given that women have become citizens, possess, at least in the formal sense, equality before the laws in the same way as men, it becomes much more difficult to simultaneously describe marriage in contractual terms and defend the right of the state to impose a universal marital regime upon all individuals. If marriage is contractual, logic suggests that individual men and women ought be perceived as entitled to regulate their relationships to suit themselves, to establish the terms of private marital contracts according to individual preferences and to insist that these be enforced by the state to the same extent as are other contracts, such as those for employment or for goods. An account of marriage as akin to a property or slave contract is no longer acceptable. This, of course, presents problems of its own, not only as regards the interests and well-being of children, although their position must be perceived as somewhat problematical, but also and more importantly because full recognition of individual marital contracts (and cohabitation contracts) might be thought to demand the extension of principles similar to those presently prevailing in contract law generally to family life.

The extension to family life of doctrines presently prevailing in contract law, doctrines such as undue influence, unconscionability, unjust enrichment, inequality of bargaining power and so on is only mildly problematical. Indeed, given the administrative and discretionary nature of contemporary family law and the increasing assimilation of marriage-like relationships to legal marriage, this change might, substantively, make little difference, given that many doctrines similar to these already figure (albeit inconsistently) in disputes over marital property and custody. Far more problematical must be the logical next step, the public regulation of marriage and marriage contracts on a model analogous, perhaps, to the contemporary regulation of the workplace and workplace relationships. Given the insistence of contemporary egalitarians that family life represents the heart of the private sphere, that family relationships (and indeed sexual relationships generally) epitomize private freedom, symbolize the moral independence of the individual⁵, full assimilation of marriage, not to the

⁵ Rawls' insistence upon the fundamental neutrality of political liberalism and upon the sharp distinction between the virtues associated with the ideal of a good citizen and those appropriate to family life epitomizes this. See 'The Priority of the Right and Ideas of the Good', loc. cit., 262-63. Similarly, Dworkin has recently emphasized 'freedom of choice in matters touching central or important aspects of an agent's personal life, like employment, family arrangements, sexual privacy, and medical treatment.' 'The Place of Liberty', loc. cit., 7. Freedom of choice in employment and in medical treatment are comparatively easy analyse, emphasizing the right to choose one's occupation or one's medical practitioner and, equally, the right to leave employment or to reject treatment. Freedom of choice in family arrangements is generally interpreted as encompassing the right to choose one's marital partner, to terminate an unsatisfactory marriage, to determine family size, and so on. Family arrangements are, however, far more problematical. Two equal adult individuals are involved, at a minimum. Where there are children, decisions must be made on their behalf, and given the lasting consequences of many of these decisions, determining a just basis for decision making seems critical. Further, family roles and arrangements have, historically, had profound distributive consequences. Many such practices have contributed to the profound economic disadvantages faced by women both in the past and at present. Because, each individual has, according to Dworkin, a right to be

social contract, but to ordinary contract and by logical extension to employment contracts must open the door to the eradication of any conception of family relationships as private. On such a model, given the demise of freedom of contract generally, and the insistence of contemporary theorists that public intervention is essential to protect the interests of the weak, marriage and family relationships would become public in the same way as the other relationships of civil society. This, of course, is the precise problem that classic social contract theory was structured to avert. On the contemporary egalitarian liberal model, there is no reason why relationships between men and women ought to be treated in any way differently from other exchange relationships between individuals, between individuals and corporations, and so on.⁶

What is, of course, fascinating, is the fact that recent and superficially egalitarian legal reforms, such as those embodied in Australia in the *Family Law Act* 1975 have generally moved, not towards an enhanced regulatory regime, nor towards a regime of private contract, but towards a discretionary regime marked by the eradication of fault as relevant to dissolution of marriage and the legal characterization of the conventional incidents of the marital relationship as non-obligatory. Such regimes have, at least superficially, moved closer to the new egalitarian ideal of freedom of choice in private relationships and the eradication of contract and principles derived from contract. This uniquely contemporary ideal is one which, in essence, argues that private relationships ought, in large part, be delegalized, reflect simply the preferences of the individuals involved. Equally, of course, the distributive consequences of marriage and family life have been ignored by egalitarian theory. Neither Rawls nor Dworkin consider the distributive consequences of family relationships, instead distributive justice within the family collapses into freedom of choice in family arrangements. The family is viewed, not as an institution generating obligations which the state ought to acknowledge and enforce, but a choice made by an autonomous individual which remains open to revision and, indeed, abandonment.

The difficulties noted in the last few paragraphs emphasize the need for a new and different foundation for legal regimes regulating marriage and family life. The demand for legitimation which was resolved under classic social contract theory by the exclusion of women from the social contract and the legitimation of masculine authority over women and children achieved through the marriage contract has reemerged. While the full assimilation of marriage to ordinary contract seems logical and superficially consistent with egalitarian ideals, it poses significant problems given the denial by contemporary egalitarians of any conception

treated with equal concern by the government, and is entitled to an equal share of resources, the distributive consequences of 'family arrangements' cannot be ignored.

⁶ As emphasized in earlier chapters, all the same problems can arise in marriages as regularly arise in other situations where power disparities exist.

of freedom of contract.⁷ If the state is, as contemporary egalitarians acknowledge, entitled to establish the wages and conditions appropriate for employees, legally mandate safe conditions of work, increasingly require that benefits such as sick leave, holiday leave, protection against unfair dismissal and so on be guaranteed to employees, upon what rational basis can marriage be distinguished, if, it must be emphasized, it is ultimately founded upon contract? Neither Rawls nor Dworkin consider specifically the nature of marriage nor the legal or moral foundation of the marital relationship. In order to infer its theoretical basis it is necessary to have recourse to their more general accounts of the nature of obligations and to attempt to build from these an account of marriage (and marriage-like relationships) which accords with their views concerning the structure of obligations generally and with the egalitarian principles upon which their theories are predicated. I shall deal with their accounts in turn, beginning with that of Rawls.

RAWLS AND OBLIGATIONS

Rawls argues, as a general principle, that '*a person's obligations presuppose a moral conception of institutions and therefore that the content of just institutions must be defined before the requirements for individuals can be set out.*'⁸ Presuming that the institutions in question are just, Rawls argues that

*there are several characteristic features of obligations which distinguish them from other moral requirements. For one thing, they arise as a result of our voluntary acts; these acts may be the giving of express or tacit undertakings, such as promises and agreements, but they need not be, as in the case of accepting benefits. Further, the content of obligations is always defined by an institution or practice the rules of which specify what it is that one is required to do. And finally, obligations are normally owed to definite individuals, namely those who are cooperating together to maintain the arrangement in question.*⁹

Given the above passages, marriage, for Rawls, quite clearly represents an institution or practice which is governed by specific rules and which is capable, if just, of generating obligations. The importance of ascertaining the justice of marriage as a social practice or group of practices, becomes clear in the light of Rawls' subsequent insistence that '*the contract doctrine holds that no moral requirements follow from the existence of institutions alone*' and that obligations within any institution arise only as a consequence of the ethical principles chosen in

⁷ Dworkin, *Taking Rights Seriously*, loc. cit., 277-78, *Law's Empire*, loc. cit., 374. An interesting question arises in this context. If the state is, as Dworkin emphasizes, entitled to regulate hours of work and conditions in contracts of employment, ought it not, if marriage is contractual, be entitled to, for example, regulate the hours of work and conditions allowed in marriage contracts?

⁸ Rawls, *A Theory of Justice*, loc. cit., 110.

⁹ *Ibid.*, 113.

the original position.¹⁰ In the present context, this poses an immediate and serious difficulty. Taken at face value, these remarks suggest that marriages and family relations more generally are capable of generating obligations only if their internal structure can be reconciled with the principles of justice chosen in the original position. As currently formulated, these principles specify that

1. *Each person has an equal right to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with a similar scheme for all.*
2. *Social and economic inequalities are to satisfy two conditions: first, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.*¹¹

Applied to marriage, these principles suggest that first, no marriage is capable of generating obligations if its rules and practices deny to any adult individual equal access to the basic liberties, including freedom of association and the liberty and integrity of the person. This would, I believe, identify as non-obligatory all those family practices in which individual freedoms such as these are in any way compromised, for example by practices which, as in some cultures, deny to the wife or to girls and women more generally freedom of association while permitting this to the husband, or which maintain that she has a duty to submit to sexual relations.¹² Similarly, to satisfy the principle of equality of fair opportunity within the family would apparently require that marital relationships be structured in a way which ensured that husband and wife be, so far as their relationship with one another is concerned, equally positioned with respect to their capacity to compete for such positions, and to the extent that this equality does not obtain, that any inequality can be shown to be to the advantage of the less advantaged individual, viewed solely as a free and equal moral person. Other social roles characteristic of existing practices including the conventional assumptions concerning the proper roles of husband and wife must be evaluated by just standards. As Rawls emphasizes, '*laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.*'¹³ The point of having a theory of justice is to enable rational criticism of existing institutions and practices. Given that today men and women share or ought to share a common status as citizens, it is of the first and highest importance that relations between them be just. Within marriage, as within wider institutions and cooperative activities, individuals are

10 *Ibid.*, 348. I do not know whether Rawls acknowledges marriage as to be an institution in this sense, however he explicitly identifies the monogamous family as one of the institutions comprising the basic structure. *Ibid.*, 7.

11 Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 251.

12 Within the contemporary pluralist state, it must be noted, such practices remain commonplace, and indeed, in many American states the duty of the wife to submit to sexual relations continues to be enforced by law.

13 Rawls, *A Theory of Justice*, *loc. cit.*, 3.

entitled to a fair share of the benefits of cooperation. If these conditions are not met, no obligations arise.

The account I have given would be, of course, in no way necessarily problematical if it were clear that Rawls intended his principles to be applied in this way and if simply treating non-conforming relationships as non-obligatory was capable of providing a resolution which is just when husband and wife are considered simply as citizens.¹⁴ Equally clearly, the fact of contract, or tacit agreement or the acceptance of benefits is not the critical element, any more than it is within any other institution. While social life may be voluntary all the way down, what is critical is whether the structure of the practice, taken as a whole and including the roles which are perceived as central to its continued existence¹⁵, can be reconciled with principles which would be chosen behind a veil of ignorance. To the extent that many family practices, as they currently exist, do not conform to the principles of justice, their persistence must confront wider institutions, and most particularly political institutions as conventionally defined, with a serious problem. Just as a just or nearly just society which is seeking to realize in its communal life the institutions and relationships appropriate to a well-ordered community cannot in the long term turn a blind eye to the existence of practices such as slavery or serfdom within its bounds, so, too, and for identical reasons, it must also, in the long term at least, be unable to tolerate family practices which deny to some family members the freedom and moral personality to which others are entitled, most particularly where children are involved. This is most pressing and most obvious where the practices in question deny family members the basic liberties, including freedom of association and the freedom of the person.¹⁶ It is, I believe,

¹⁴ His insistence all post-*Theory* writings that the principles and the account of the person from which they are derived form a political conception rather than a wider moral conception and his emphasis upon building an overlapping consensus and removing from the political agenda those issues which remain profoundly and deeply divisive raises doubts in this regard. Rawls specifies the division he has in mind particularly clearly in 'Social Unity and Primary Goods', *loc. cit.*, 162 where he comments that the principles of justice 'apply to what I shall call the "basic structure of society", that is, to the way in which the major social institutions fit into one system. These institutions assign fundamental rights and duties and, by working together they influence the division of advantages which arise through social cooperation.' While the monogamous family is clearly a major social institution, Rawls regards the relationships between different families and between families and other institutions as governed by the principles of justice but does not make his position fully clear in terms of the relationships inside the institutions which form the basic structure.

¹⁵ In discussing the sorts of claims which are relevant in questions of justice, Rawls emphasizes that admissible claims are restricted to claims to the primary goods and that these, in turn, depend upon the conception of citizens as free and equal moral persons. He emphasizes further that 'the notion of a need is always relative to some conception of persons, and of their role and status'. Thus, the public conception of the needs of citizens differs from any conception of the needs of individuals occupying other roles, such as, for example those of husbands and wives. *Ibid.*, 172.

¹⁶ About such agreements Rawls comments that 'any agreement by citizens which waives or violates a basic liberty, however rational and voluntary this agreement may be, is void

also true where the practices are such as to nourish and sustain inequality in access to the benefits of social cooperation as specified by the thin theory of the good. As Rawls emphasizes it is irrelevant that the practice in question may provide greater advantages for the society as a whole. Society as a whole is not entitled to require sacrifices from some in order that others, or indeed, the community as a whole may benefit. The bare fact of tacit or actual consent must be recognized as insufficient. The question is not whether consent is rational for that individual as he or she is socially located, but whether a free and equal moral person reasoning under the constraints imposed by the original position would have so consented.

IS THE FAMILY CHARACTERIZED BY THE 'CIRCUMSTANCES OF JUSTICE'?

Despite the clarity and unequivocal nature of these arguments, it is not entirely clear that Rawls believes that the principles of justice as stated are applicable to family life or that their extension to the family is as natural and obvious as it would appear upon the basis of his account of the nature of obligations. While Rawls identifies the monogamous family as part of the basic structure and presumes that children develop their sense of justice within just families, he does not, at any time, specifically consider the characteristics which a family, or a marriage, must have to be considered just. Rather, he comes close to an internally contradictory position by emphasizing that the conception of justice offered is a concept appropriate to political institutions and that its appropriateness in other spheres, including the associational and the familial, ought not be assumed. I want to emphasize the difficulty of the distinction involved. Rawls apparently wishes to simultaneously maintain that the monogamous family is one of the institutions (his term, not mine) comprising the basic structure of society and at the same time suggest that it need not necessarily be held to standards he elsewhere characterizes as inviolable. That, in the context of the remark quoted above, suggests that before we begin to explore the nature of marriage and the nature, genesis and scope of marital obligations, we need a conception of a just marriage, or a just family, and ought not necessarily assume that the principles applicable to the political are equally applicable to family relations. Just as Rawls' ideal theory account of the state and of just institutions provides a vantage point from which to evaluate existing institutions and to work towards change, an ideal theory account of a just marriage and just family arrangements is essential if we are to evaluate existing family institutions and to work towards change.

Rawls, however, states simply that from the perspective of the basic structure one ought to assume that all positions other than that of citizen and that given by the individual's place in the distribution of income and wealth are voluntarily assumed, leaving open the possibility that the justice or injustice of these voluntarily assumed positions may be irrelevant when one is considering the justice of the basic structure, at least so far as their *distributive*

ab initio; that is, it has no legal force and does not affect any citizen's basic liberties.
Rawls, 'The Basic Liberties and their Priority', *loc. cit.*, 81.

consequences are concerned.¹⁷ Given the structure of his theory as a whole, however, it remains unclear as to why the fact that positions such as those of husband and wife are voluntarily assumed ought to be taken as in any sense determinative. Surely, whether or not such roles are voluntarily assumed, the sole question, given the pervasive nature of such relationships and their profound impact upon individual lives and opportunities, ought to be whether the structure of institutions such as family can be reconciled with the two principles of justice, not merely the basic liberties. One cannot, I would suggest, found just 'public' institutions upon a foundation of unjust 'private' institutions.

Rawls offers no guidance in this regard, indeed appears not to have directed his mind to the place of families and the law governing families within his structure more generally. In his discussion of moral development and his reference to roles within the family such as those of a good husband or a good wife, a good son or a good daughter, he apparently assumes more or less conventional relationships marked by reliance upon traditional gender roles.¹⁸ If he did not, there would be no reason to distinguish between the virtues appropriate to a husband and wife, nor would there be any reason to distinguish between those of a son and daughter. While he acknowledges that in a broader inquiry the family might be questioned¹⁹, he at no time considers whether the account of marriage and family relationships suggested by his general theory of obligations is compatible with the institution of family as we know it, or whether that theory is adequate or relevant to describe such an institution. The general structure of his account of obligations, however, leaves him no option other than a fundamentally contractual²⁰ account, albeit one which declares certain agreements void *ab initio*. I have, therefore, no choice but to proceed upon the basis that any acceptable account within the framework of Rawls' theory taken as a whole must be capable of being reconciled both with his account of the structure of obligations generally and with his account of citizens as free and equal moral persons²¹.

For marriage to be a just institution the relationships within it must be structured in a way which acknowledges and respects the moral personality of the individuals involved, and that demands that they be regarded simply as free and equal moral persons, or citizens. (This does not, I should note, rule out love, nor does it rule out mutual obligations which extend well beyond those required by justice. Rather, it merely reminds us of what ought to be obvious,

17 Rawls, *A Theory of Justice*, *loc. cit.*, 96.

18 *Ibid.*, 468.

19 *Ibid.*, 463.

20 Rawls' general account of obligations relies upon an expanded meaning of contract, emphasizing voluntary agreements or the receipt of benefits. In many ways it is somewhat similar to Rousseau's account of the social contract. See Chs. 8 & 9.

21 See Ch. 3.

that absent a foundation in justice, love may become indistinguishable from oppression. The cage may be gilded, but it remains a cage for all that.) Rawls' method suggests that the only way of working out the structure of marriage as a just institution, and, therefore, the only way of ascertaining the characteristics of a just family would be for reasoning to take place behind a veil of ignorance, at least if, as I shall argue they do, the circumstances of justice obtain within families. Otherwise, on his own account, we are likely to fashion an account which advances our own interests. We must ask, therefore, what principles would be chosen by individuals wholly unaware of their status in society, their natural characteristics, *their biological sex and the gender roles and institutions characteristic of our culture.*

The first step in such an inquiry is to examine the degree to which the circumstances of justice obtain within families. Rawls identifies the circumstances of justice as those conditions which obtain among individuals who are '*roughly similar in physical and mental powers, . . . vulnerable to attack, . . . [and] confronted by circumstances of moderate scarcity.*'²² These factors he identifies as the circumstances which make cooperation among individuals inhabiting a common territory both possible and necessary, but also problematical. Thus, the circumstances of justice '*obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity.*'²³

Do the circumstances of justice in this sense arise within families? It cannot, I think, be denied that they obtain within marriages. As every classic social contract theorist recognized, adult men and women are roughly equal in physical and mental powers, sufficiently so that both are ultimately vulnerable to attack. Likewise, the circumstances of moderate scarcity obtain within families just as they do as within the wider community. Resources entering most households are both finite and limited, and family members advance competing claims upon those resources which are available. Indeed, the fact that the circumstances of justice necessarily obtained within families if all family members were recognized as equally parties to the social contract was precisely the reason that classic theorists foreclosed the issue by commencing with a marital contract in which the wife yielded up her liberty and her separate identity to the husband, an option not open to Rawls. Likewise, classic theorists such as Hobbes and Locke extended the contractual account to emphasize that ultimately similar conflicts must arise between fathers and children, and that the child's obedience followed from the desire to secure a share in the father's estate. Effectively, in a tacit compact, the child offered obedience in exchange for present protection and support and for the possibility of future gain. Within contemporary households both resources and leisure are, under normal circumstances, finite and limited, and men and women

²² Rawls, *A Theory of Justice*, loc. cit., 126-126.

²³ *Ibid.*, 128.

advance competing claims to a fair share of social goods including these.²⁴ The position of children appears problematical, given their natural inequality, however this condition is temporary and Rawls in fact allows for their position in his account of reasoning in the original position.²⁵ The fact that access to wider opportunities is, at least in part, determined by the resources and leisure time available within the family, reinforces my claim that the circumstances of justice obtain within families just as they do within the wider community. (Simply assuming an ideal family in which individuals do not wish to gain unless others do as well assumes away the problem, rather than resolving it. It is necessary both to have an account of an ideal family and to figure out how to get there from where we are.) Resources entering the family are routinely allocated among family members, including children, and within a substantial number of families this allocation is made upon the basis of conventional roles, rather than upon the basis of the entitlement, as individuals, of all family members to a fair share of primary goods. Thus, to give a simple example, where resources are limited, many families continue to believe that it is more important to devote resources to the education of boys rather than girls, given the end in view, that of ensuring that they are appropriately prepared for their future role as breadwinners.

The emphasis upon mutual disinterest seems intuitively less acceptable in the context of marriage and family life. Our ordinary common sense perceptions suggest that family members do, normally, take an interest in one another's interests, indeed such ideas form the core of our cultural beliefs concerning marriage and family life. Frequently, the belief that family life is/ought to be predicated upon love and intimacy is thought to proscribe reasoning upon the basis of mutual disinterest. Upon closer examination, however, given Rawls' discussion of the role of mutual disinterest in reasoning, I would argue that it may be, in fact, no less appropriate as a basis for determining background standards for just family relationships. It in no way seems counter-intuitive to describe a marriage as '*a cooperative venture for mutual advantage [and as] typically marked by a conflict as well as an identity of interests [nor is it counter-intuitive to describe husband and wife as having] their own plans of life [and] different ends and purposes*', indeed that is precisely the problem and the reason justice is necessary within families.²⁶ While, undeniably, ideally husband and wife have many ends in common, and act to further these cooperative goals, they also remain distinct individuals and it is unrealistic to assume complete commonality of interests. If all interests were common to all family members, if no divergence existed, if no disputes arose as to how best to pursue even shared interests, one would, I think, either have assumed away human nature or instituted an oppressive regime intended to eradicate the individuality of one

²⁴ The prevalence of marital disputes over either money or, more recently, over the distribution of household tasks emphasizes this.

²⁵ *Ibid.*, 248-49.

²⁶ *Ibid.*, 126-27.

individual. Hobbes, Locke and later Bentham all recognized that the circumstances of justice were potentially relevant to family relationships, and, as we shall see subsequently, Rousseau devoted much of his theoretical project to an attempt to devise an educational project which would ensure that such conflicts could not arise.²⁷ The terms of the marriage contract in classic theory were structured to avert the logical consequences of this recognition.

Thus, I see no difficulty in accepting that, given that the circumstances of justice arise between husband and wife in substantially the same way as they do elsewhere, reasoning regarding a just basis for marriage ought to proceed upon the same basis as does reasoning about justice more generally. If one accepts Rawls' general method, and the arguments he offers for utilizing the 'thickest possible veil of ignorance', there is no reason why it is inappropriate as a basis for determining an account of justice in family relationships. Not only is family life characteristically marked by conflict as well as unanimity of interests, but also even social emotions such as love can lead to favouritism and inequality, and this is as true within the family as in the wider community. For this reason, it follows that the principles of justice apply within families as elsewhere, given that the circumstances of justice are present and because of their presence the same constraints on reasoning ought to apply. It also follows on Rawls' account that no obligations arise among family members unless the institution or practice of family itself can be seen as just (or nearly so), that is, unless the practice of family seeks to structure relationships in a way which enhances the ability of family members to secure a fair share of the benefits of cooperation and to maximize their access to the basic social goods as defined. (I should note that I am not entirely happy with this description of the problem, however within Rawls' framework I see no other option. It seems to me that, in fact, the problem is that in unjust families some individuals are failing to live up to their obligations as established by ideal theory, not that they do not have them.²⁸)

Just as Rawls emphasizes that society ought to be regarded as a cooperative venture for mutual advantage, certainly marriage must be so regarded.²⁹ While entry into marriage, unlike entry into political society, may be seen as properly voluntary³⁰, given that family life in the broader sense is no more voluntary than is membership in political society, this limited distinction does not rule out the use of Rawls' method. We can no more escape family

²⁷ See Ch. 8.

²⁸ See the discussion of the identical problem in Dworkin's account of associative obligations later in this chapter. The fundamental difficulty is that the weak, particularly those who are children, are unlikely to be able to extricate themselves from unjust relationships, and that simply suggesting that such relationships generate no obligations does little to assist them.

²⁹ The sociological evidence canvassed earlier emphasizes both the extent to which such conflicts do arise and the potential for injustice within families.

³⁰ There are, of course, exceptions and arranged marriages do in fact continue to prevail among some cultural groups.

membership and its consequences than we can escape some form of political institutions. Neither does the fact that children are ordinarily unable to advance claims and assert their interests. Indeed, their vulnerability in this regard emphasizes and intensifies the need to ensure that the circumstances of family life are, in fact, just. The critical factors to be considered with regard to children are their temporary inability to determine their own rational interests and act to advance them and the necessity to ensure that those who must act upon their behalf respect their potential to become free and equal moral persons. Since parents ought not presume that they are uniquely placed to know what the settled preferences of their children will be when they reach maturity, it would appear that they have no recourse but to decide upon the basis that their children will, as adults, prefer a greater rather than lesser share of basic social goods. Rawls acknowledges this and comments, in addressing the basis upon in which paternalistic decisions ought to be made on behalf of those, such as children, who cannot rationally advance their interests, that such decisions *'are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods.'*³¹ In the case of young children, of course, since they have not yet developed settled preferences and interests, the primary goods offer the only legitimate basis for decision making. Rawls emphasizes that paternalistic intervention must be guided by the principles of justice. Given this, I conclude that justice is the first virtue of family relationships as it is of all other social institutions. While it is not the only virtue which may be relevant, its presence is critical.

LOOKING AT THE ORIGINAL POSITION

Once we recognize that the circumstances of justice obtain within families as elsewhere, it must be acknowledged that Rawls' account of the original position is, in certain respects seriously deficient. Earlier, I noted the fact that nothing in Rawls' account of the original position took into account the need to ensure that the concrete responsibilities (or obligations) involved in securing the welfare of future generations are fairly shared and that he persistently suggests that a fair share of the primary goods may not be relevant outside the political as he (rather narrowly) defines it. Based upon his own analysis, doing so is fundamental to an account of justice more generally, given that the circumstances of justice obtain within families as elsewhere and given the pervasive nature of family as a social institution. Because the social problem which necessitates justice is the fact that people often pursue their own interests at the expense of those of others, and that, as a consequence, the benefits and burdens of cooperation are unfairly distributed, it is striking that those in the original position fail to recognize that the concrete responsibilities involved in securing the welfare of subsequent generations are among the burdens of social cooperation, necessary background conditions to any form of human social life. After all, those in the original position recognize the principle of paternalism in order to protect themselves against the

³¹ Rawls, *A Theory of Justice*, loc. cit., 249.

possibility that they will be unable to secure their own interests, ie. that they may discover themselves to be children. Given that the division of labour between men and women in this regard represents the most fundamental and enduring example of the social division of labour generally, it would seem absolutely critical to ensure that it does not affect more general social outcomes. We must consider further whether Rawls' theory as it stands offers the critical resources necessary to address questions such as these.

In existing, unjust societies, as argued earlier, it is quite clear that women's access to the basic social goods is largely determined by their family circumstances and roles. Some family practices continue to deny women access to some of the basic liberties, including freedom of association and the liberty and integrity of the person as defined by the rule of law. Many more effectively deny to women the free choice of occupation against a background of diverse opportunities, if only because conventional family practices assign to women primary responsibility for social reproduction and for the care and nurturing of children, and this, in itself, is sufficient to significantly limit their access. Similar arguments have already been put with respect to the other categories of basic social goods identified by Rawls. Clearly, families which restrict access to the basic liberties cannot be tolerated. Other disadvantages are allowable only to the extent allowing them can be shown to be to the advantage of women, as a group. All inequalities must satisfy the two conditions specified by the difference principle. First, it must be shown that the lesser freedom women enjoy in terms of choice of occupation against a background of diverse opportunities and in terms of their access to the powers and prerogatives of offices and positions of responsibility is to their benefit, just as it must be shown that their diminished share of income and wealth is to their benefit. Second, it must be shown that these inequalities are *'attached to offices and positions upon to all under conditions of fair equality of opportunity.'*³²

The problem with existing, unjust, family arrangements is that not only are the roles within the family not open to all under conditions of fair equality of opportunity (parenting, for example, remaining significantly gendered); but also, the conventionally accepted structure of family roles renders public fair equality of opportunity formal rather than substantive. Persons may be entitled to fair equality of opportunity, even biologically female persons, but many opportunities within wider institutions are structured in a way which rules out the possibility that persons may also be wives and mothers. (Many families, of course, are likewise structured in a way which explicitly denies that wives and mothers can also be persons.) I am unconvinced by Rawls' suggestion that individual institutions within a social structure may be unjust while the social structure as a whole is, in fact, just.³³ While this may just possibly be

32 *Ibid.*, 83.

33 *Ibid.*, 57. Rawls notes that *'an institution may be unjust although the social system as a whole is not [and that it may be that] one apparent injustice compensates for another [making] the whole less unjust than it would be if it contained but one of the unjust parts.'*

the case with peripheral institutions, where one is dealing with an institution as pervasive as family it is more likely that injustices within the family will in fact be reinforced by complementary unjust practices in other institutions, as is in fact the case in contemporary society. A specific institutional form of injustice will become socially normative, and in order to address it within one institution, it becomes essential to address it in all others where it is to be found. We need therefore evaluate Rawls' theory further and ask whether it provides the resources to address existing forms of injustice within families while maintaining its commitment to tolerance and to realizing a stable overlapping consensus.

RAWLS AND EDUCATION - RIGOROUSLY APPLYING THE PRINCIPLE OF PATERNALISM

The difficulty noted in the last paragraph, that, at least where fundamental institutions are involved, injustice is seldom if ever discrete and confined to a particular institution poses a particular problem in the context of Rawls' unfortunately truncated remarks upon the role of the state in imposing educational requirements. Given the arguments put in *A Theory of Justice*, and in particular Rawls' emphasis upon the fact that, where individuals have not yet developed settled preferences we must decide for them upon the basis that they would prefer a greater rather than lesser share of the primary goods, his remarks upon the limited role of the state in respect of the education of children must be taken as either incompletely thought out or ultimately inconsistent with his theory more generally. Rawls emphasizes that those religious sects, for example, who seek to remain apart from the influences of contemporary culture, are entitled to do so and that the state's interference in the education of their children ought to be limited to ensuring that they are aware of their political rights and prepared to be fully cooperating and self-supporting members of society. *'The state's concern with their education lies [Rawls states] in their role as future citizens.'*³⁴

Yet, given that in many families, such as the patriarchal family described by Dworkin, opportunities and options are differentiated by gender, given that family decisions are frequently made upon the basis of the ideal-typical gender roles prescribed by the practice rather than upon any conception of the potential of children to become free and equal moral persons, and given that Rawls himself acknowledges that paternalistic decisions ought to be made upon the basis of a presumption that the individual will, upon attaining full capacity, prefer a greater share to a lesser share of the primary goods, his emphasis upon limited intervention becomes problematical. Surely the principles of justice demand a far more active role for the state. Teachers and education authorities are normally thought to stand *in loco parentis* in respect of the children in their care. It would appear, therefore, that, as a minimum requirement, education ought to proceed upon the basis that when the children come to maturity a greater share of primary goods will be preferred to a lesser. It follows that educational decisions ought to be made upon the basis of whether or not a given course of study

is likely to further this end. Rawls himself makes it clear that where individuals have not yet developed settled preferences (and this is the case with children well into adolescence) all decisions ought to be made to maximize access to the primary goods. Likewise, to the extent that, within many families, decision making proceeds, not upon the basis Rawls identifies as appropriate, but upon the basis of traditional gender roles and the conduct appropriate to these roles, it would appear that to the extent the paternalism necessary in respect of children is exercised in a way which cannot be reconciled with the principles of justice, not only are such families devoid of obligations but also active intervention by the state upon behalf of the children and their long range interests may be mandatory. (Does this require '*the oppressive use of state power*' as Rawls suggest must result if a society is ordered by any comprehensive doctrine, religious or secular?³⁵) While Rawls recognizes in a footnote that the rights of parents are constrained by that necessary to ensure the adequate development of their children's moral powers³⁶ it seems clear that he has not considered the full implications of what this may require or the level of intervention required.

The critical issue in all circumstances in which paternalistic intervention is appropriate is that we are dealing with individuals who do not, for some reason, have the present capacity to develop and pursue rational interests and life plans, and, as a necessary consequence, others must act on their behalf. Where those who ordinarily might be thought to be best placed to do so fail to exercise their powers justly, their failure, it would seem to me, demands intervention by the state, given the natural and temporary incapacity of children. While, with respect to adults, it may be thought sufficient to simply acknowledge that unjust arrangements generate no obligations and that seriously unjust arrangements (those which deny some individuals access to the basic liberties) are void *ab initio* leaving the individuals involved to fend for themselves, this 'hands off' approach cannot be considered appropriate where the interests of children are involved. A practical complication arises in this context. Within the sorts of pluralist states to which Rawls envisions his theory applying, there are also a plurality of family practices, some of which may be just or nearly so and others which are profoundly unjust, a social fact which emphasizes the need for a clear, public standard, one which could, viewed from the appropriate perspective, be accepted by all. I have argued above that Rawls' account of the principles of justice has the capacity to provide such a standard, despite his reluctance to so apply it. It also, and this cannot be too strongly emphasized, must necessarily collapse the boundary between private lives and public persons he wishes to secure. If, as I have shown, the circumstances of justice apply within families as elsewhere, it would appear that state intervention on behalf of children is mandatory, not optional, in all circumstances where it might appear those responsible for securing their interests as defined fail to fulfil their responsibilities in this regard.

³⁵ Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 249.

³⁶ Rawls, 'Justice as Fairness', *loc. cit.*, 245, n. 27.

In discussing marriage and family life, and, in particular the principles which ought to govern family life if Rawls' method and theory are to be taken seriously, it has been necessary to draw upon widely scattered remarks, some of which might well appear to many to be inapplicable to family life as it is normally understood. In arguing that the circumstances of justice typically arise within families as elsewhere, and that no rational distinction can be made upon that basis, and in arguing further that, given this fact, and given that, as classic social contract theorists recognized, such relationships are typically marked by a divergence as well as an identity of interests, we emphasized the need for a just foundation for family life. Given that paternalistic decision making is inevitable where children are involved, we, in fact, identified a profound and significant reason for suggesting that families ought to be held to *higher* standards in respect of justice than are less intimate institutions. Given its conventional role in the rearing of children, and given the unavoidability of paternalistic decision making, it might be thought that most particularly within the family partial compliance is unacceptable, that a 'nearly just' family is a contradiction in terms. Yet Rawls' account also and profoundly depends upon the notion that a coherent distinction can be drawn between the public identity of the individual as citizen and his or her nonpublic identity. He emphasizes that

*citizens in their personal affairs, in the internal life of associations to which they belong, may regard their final ends and attachments in a way very differently from the way the political conception involves. Citizens may have . . . affections, devotions, and loyalties that they believe they would not, and indeed could and should not, stand apart from and objectively evaluate from the point of view of their purely rational good.*³⁷

Inevitably, among these affections, devotions, and loyalties are those to family members, just as among the conceptions of the good and moral doctrines which individuals may affirm as part of their nonpublic identity are doctrines and conceptions which not only structure family life, but impact profoundly upon decisions and choices with respect to children. Here, a distinction made earlier is again relevant. I argued that Rawls failed to consider with sufficient clarity one critical possibility. While an overlapping consensus may indeed be possible to the extent that individuals, families and religious or ethnic associations will, in fact, come to endorse Rawls' conception of justice with its emphasis upon society as a fair scheme of cooperation, this becomes more tenuous and difficult if we insist that the internal life of these families and associations ought be subjected to the same standards. Rawls emphasizes in recent writings that the political virtues³⁸ are intended to characterize the ideal of a good citizen and that they must be distinguished from *'those appropriate to roles in family life and to the relations between individuals.'*³⁹ While Rawls acknowledges that the political virtues *might* also be valued for

³⁷ *Ibid.*, 241.

³⁸ Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 263 identifies these as civility and tolerance, reasonableness and a sense of fairness.

³⁹ *Ibid.*, 263.

other reasons within particular comprehensive schemes,⁴⁰ and earlier noted that the '*moral sentiments that support adherence [to the principles of justice] are those that it is rational for the members of a well-ordered society to want in their associates*'⁴¹ he never attempts to locate such principles and the moral sentiments which support them in the context of their necessary role in nonpolitical associations.

I have argued throughout that, by his failure in this regard, Rawls has averted his gaze from the precise elements which make a stable overlapping consensus profoundly unlikely once we recognize that the circumstances of justice obtain within families as elsewhere. In this chapter, I have, I believe, established that not only ought the relationship between husband and wife be governed by the principles of justice, that between parents and children must be. We need, that is, not only a theory of just relationships between the institutions of which the basic structure is comprised, but a public theory of just institutions, one known and acknowledged by all. Again, I must emphasize that the requirements of justice ought to be seen as the minimum requirements for social cooperation. Nothing in this requirement rules out the possibility that more demanding standards may be deemed essential to practices such as family. Such may well be appropriate. However, from a public perspective, viewing the justice of individual families from the perspective of citizens conceived simply as free and equal moral persons, it is clear that, in societies such as our own, it is critical that minimum standards be publicly established and upheld by wider institutions.

RAWLS AND THE JUST FAMILY

Now I should like to return to the relationship between husband and wife and apply Rawls' theory and his principles to that specific relationship. Earlier we examined the primary goods as identified by Rawls, and the degree to which, historically and in contemporary societies, women have been profoundly disadvantaged in access to these goods, and indeed, noted the fact that among many segments of society, access to many of these goods continues to be perceived as inappropriate for women. We also noted the degree to which women's inequality is inseparable from their familial roles and the characteristic virtues associated with roles such as those of wife and mother. Likewise, we came to recognize that women and children, uniquely, are far more likely to become the victims of violence within the family than within the wider community and that the true extent of such violence is unknown. We have, that is, moved from the problems associated with developing an ideal theory account, and into the realm of partial compliance, again assuming the existence of a background ideal theory standard.

Given that existing institutions are unjust, and given that, under existing conditions the benefits of cooperation are not fairly shared at present nor are they likely to be in the

⁴⁰ *Ibid.*, 264, n. 21.

⁴¹ Rawls, *A Theory of Justice*, *loc. cit.*, 437.

foreseeable future, it is time to turn to the real, real world. Now we must attempt to ascertain whether the principles of justice as derived and stated by Rawls offer the conceptual tools needed for an account of family law and a legal basis for family relationships and for the resolution of disputes which arise because existing institutions are not uniformly just and compensatory measures are essential. Let us consider first the clearest situation, that which arises where a particular family is seriously unjust, where, let us say, the basic liberties are arbitrarily denied to one family member by another. (In many abusive families, not only is the victim frequently deprived of the liberty and integrity of the person, freedom of association is also often denied as is, in practice, the right to hold personal property.) If we have a background conception of family as an institution structured by the principles of justice, do we have the conceptual tools which are needed to resolve the situation? (If we have no such background conception, it may make no sense to speak of family relationships as just or unjust. Classic social contract theory did, in fact, provide a background conception. While this background conception denied that women (and children) were members of civil society, it provided the foundation for a clear public regime. It is one which has been overtaken by events.) First, where profound injustice is involved, from a legal perspective, all rights and obligations which either or both of the parties may perceive as binding among themselves are void. Whatever promises or agreements may have been involved have no legal existence and are wholly irrelevant to a just resolution. Second, where the degree of injustice has been such as to compromise the capability of one of the adult individuals involved to rationally identify and pursue his or her own interests, the principle of paternalism discussed earlier applies. It follows, I believe, that the state has an obligation to intervene directly under such circumstances. Two distinct possibilities exist. The state may either proceed upon the basis that it ought to attempt to restore the victim to the position which that individual would have occupied had the relationship never existed, or it may attempt to place the victim in the position which that individual would have occupied had the relationship been justly structured. Simply proclaiming the relationship null and void is not a resolution which meets the demands of justice, given that it does not provide any form of redress but involves the pretence that the injustice might be seen as localized and devoid of wider consequences.

Where children are involved the situation becomes significantly more complicated. It does not seem to me that it makes much sense to suggest that no obligations are involved, even if that might be said to be the case in respect of those which the adults perceive as binding among themselves. Rather, the problem is that the public obligations which form the basis of just family relationships have not been honoured, and as a consequence, the state has an obligation to intervene. (Since I am attempting to determine the extent to which Rawls' principles as applied to the family provide a basis for dealing with the sorts of problems commonplace in existing pluralist societies, I ignore for the moment the fact that our society has no theory of the just family capable of providing background standards, although that undoubtedly provides one reason for the difficulties in expounding adequate principles for family law. Rather, our society operates upon the basis of a rag-tag collection of family

ideologies and practices whose justice has never been considered, in part because the family is conventionally believed to be outside the realm where justice is relevant.) The state can neither proceed upon the basis of restoring the children to the position they would have occupied had the relationship not existed nor can it readily place the children in the position they might have occupied had the relationship been just. The first approach is negated by the likelihood the children themselves might well not have come into being. The second demands the reconstruction of family relationships upon a just basis, and such reconstruction is well beyond the scope of our present level of understanding of human psychology and relationships. The best that can be hoped for, therefore, assuming that the adult victim has the capacity to act justly in respect of the children⁴², is to place the wronged parent together with the children in a position which, as nearly as may be possible, approximates that which they would have enjoyed in a just family. (Quite clearly, that involves securing to the parent and the children a fully adequate share of the basic social goods, and that may well involve provision not only of means of subsistence which are fully adequate, but also of provision of the background opportunities essential for full participation in the public culture.) If this cannot be done, no alternative exists but to attempt to place the children in a situation where their interests and needs as identified by the principle of paternalism will be fully served.

In more ordinary situations, where, perhaps, the family in question is not justly structured, but the injustice is not so severe as to render the marriage void *ab initio*, the situation becomes more complex. (I assume, for the purposes of argument only, that this represents the normal situation in cases of family breakdown.) First, if we presume that the obligations involved in marriage arise in the way in which other obligations arise within Rawls' general theory, and I can find no basis for assuming otherwise in the context of Rawls' theory taken as a whole, it will be insufficient to simply attempt to place family members in a position which approximates that which they would have occupied had the relationship been just. The promises and undertakings involved in the relationship itself must be considered irrespective of whether these have been formalized into a contractual document. Unlike the grossly unjust situation discussed above, such cannot simply be deemed void. Where such promises and undertakings are consistent with what justice requires, even if they go well beyond its requirements, they ought to be taken into account in determining the relationship of the parties. Where, however, they are inconsistent with the requirements of justice, they can be given no weight. This would, I believe, include enforcing the terms of individual marital contracts and tacit agreements, excluding only those terms which cannot be reconciled with the principles of justice as stated. Only where such terms could not be severed would it be

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In this context acting justly requires the capacity to have full regard to the moral personality of the children, and, Rawls' theory specifies that to the extent they have developed settled preferences which are themselves rational these be satisfied, and, failing this, that those acting on their behalf make decisions upon the basis that when they attain full rationality they will prefer a greater rather than a lesser share of the primary goods.

appropriate to disregard the desires of the parties concerned altogether. Quite obviously, and appropriately, this leaves open the possibility of a inquiry into fault to the extent that such promises and undertakings are voluntarily undertaken by the parties themselves. Equally obviously, given that we are here dealing with free and equal moral persons, fault cannot be conventionally established upon the basis of, for example, traditional gender roles. Rather a full legal determination based upon the understandings and undertakings of the parties themselves becomes essential. The involvement of equitable principles cannot be foreclosed, perhaps including something akin to the requirement that the parties come before the court with clean hands.

Determining the best possible outcome with respect to the children becomes more complex. Here it is likely that neither parent has forfeited altogether his or her 'parental rights',⁴³ and both may be reasonably capable of acting justly with respect to their children.⁴⁴ For this reason, it is likely that conflicts will arise concerning the interests of the children and the steps which ought to be undertaken to further those interests. To the extent that the children themselves have settled preferences which are rational, these clearly must be taken into account. Where this is not the case, it would appear that the decision ought to be made on the assumption that the children, when they attain full rationality, will prefer a greater to a lesser share of primary goods. I find this less than fully satisfactory, since, *ceteris paribus*, it suggests that one of the determinative factors may well be the material advantages of the respective households. However, the willingness of each of the parents to act so as to further the children's interests in this regard is equally relevant. In this context it becomes critical that the resolution as regards the parties themselves is just or nearly so since the material conditions obtaining in the household of which the children are a part are likely, in the long term, to have a significant bearing on their access to the primary goods.⁴⁵ If, on family dissolution, a strictly equal division of resources is chosen (even assuming agreement could be reached upon those goods which are to count as resources for this purpose) this will yield a just result only to the extent the previous relationship of the adults has satisfied the constraints of the difference principle. (Provision for the welfare of the children must be considered separately, and such provision must be made in accord with the principle of paternalism and in recognition that the background obligations of each parent to provide for their children's

⁴³ I use this term only because Rawls speaks of the rights of parents.

⁴⁴ Here I need only assume that both parents desire to ensure that all their children have the widest possible range of options (consistent with justice) open to them as adults and that, as specified in the construction of the original position, they have a concern for the well-being of their immediate descendants. As Rawls notes it is possible to work out the demands of intergenerational justice by assuming 'a generation cares for its immediate descendants, as fathers say care for their sons.' *A Theory of Justice*, loc. cit., 288.

⁴⁵ Rawls recognizes this source of inequality although he does not address it in this context. Cf. *Ibid.*, 301.

material well-being are equal.⁴⁶) Where, during the marriage, the adult individuals have chosen to allocate responsibilities among themselves in a way which has significantly limited the access of one of them to the primary goods to a degree incompatible with the constraints of the difference principle, an equal division of the available resources will be inadequate. Rather, given that the demands of justice have not been complied with during the relationship itself, it will be necessary to divide resources (and quite possibly make provision for ongoing support) with a view towards putting the parties, so far as possible, in the position they would have occupied had the relationship been conducted justly. Where this is not possible, given the resources reasonably available to the parties themselves, I would argue that, to the extent that political institutions have been implicated by their failure to restructure wider institutions to ensure that they more nearly conform to the requirements of justice, they are obliged to secure to the less advantaged individual that share of basic social goods which would have been enjoyed (given the general level of wealth of the society and the level of development of its institutions) had family institutions been just. If none of this is entirely satisfactory, strictly speaking, much of its inadequacy stems from the injustice of many basic institutions themselves and our cultural failure to address the fundamental issue of the just family.

None of what has been written above represents, in the strict sense, Rawls' theory as he has developed and presented it. Indeed, Rawls' work, taken as a whole, endeavours to place the family beyond the reach of justice, to emphasize that justice applies to the basic structure merely, to the public rights and obligations defining the relationships between the basic institutions. All I have attempted to do is argue first, that the circumstances of justice apply within families, that given the circumstances of justice and the constraints upon reasoning Rawls argues are essential to ensure that individuals will not structure institutions to their own advantage, no reason is apparent why different principles ought to be appropriate to family life. If the problem is fundamentally the same, and the method is appropriate generally, the same principles will emerge. The rest belongs to partial compliance, the attempted application of just background principles to an unjust world.

DWORKIN AND ASSOCIATIVE OBLIGATIONS

Dworkin's account of obligations attempts to disassociate liberalism from the contractual paradigm characteristic both of early social contract theory and of the work of recent theorists such as Rawls. Dworkin argues that philosophers have erred in seeking to derive an account of political legitimacy from conceptions such as justice.⁴⁷ As he puts it, justice is too universalistic in its aims and ambitions to account for the specificity of obligations, their attachment to particular local communities. It cannot, according to Dworkin, explain why a citizen of Britain has an obligation to British institutions which is different in

⁴⁶ See Ch. 11 for a discussion of this point.

⁴⁷ Dworkin, *Law's Empire*, *loc. cit.*, 193.

character from any duty to support just institutions more generally. Likewise, according to Dworkin, the argument from fair play⁴⁸ allows too much. It both seemingly presupposes that obligations can be incurred merely by the receipt of benefits, whether sought or not, and, according to Dworkin, leaves the term benefits fatally ambiguous.⁴⁹

I shall not address Dworkin's rejection of the arguments offered by Rawls in any detail⁵⁰, rather my present concern is with the structure of Dworkin's account of associative obligations and with whether it has the capacity to provide an acceptable account of marital obligations and an acceptable background standard for family law and the resolution of matrimonial disputes generally. Dworkin's account emphasizes, not voluntariness, or consent or the making of promises, but social practices taken as practices. He wishes to derive an account of obligations generally from

*the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors. Most people think that they have associative obligations just by belonging to groups defined by social practice, which is not necessarily a matter of choice or consent, but that they can lose these obligations if other members of the group do not extend them the benefits of belonging to the group.*⁵¹

Dworkin comments further that

*the history of social practice defines the communal groups to which we belong and the obligations that attach to these. It defines what a family or a neighborhood or a professional colleague is, and what one member of these groups or holder of these titles owes to another.*⁵²

48 Dworkin provides a schematic outline of what he terms the argument from fair play, in *Law's Empire*, loc. cit., 193-195. As he acknowledges it is a sketch of Rawls' account of obligations as discussed earlier in this chapter.

49 Dworkin, *Law's Empire*, loc. cit., 193-195.

50 I should note that I do not believe that the criticism levelled by Dworkin is fair to Rawls' argument. First, Rawls insists that obligations arise only among individuals who are engaged in a common cooperative venture or social practice, deflecting the first criticism, and second, Rawls argues explicitly that no obligations arise where the institution or association cannot be seen to be just or nearly so, that is where its rules and practices cannot be reconciled with those which would have been chosen by individuals in the original position. Nozick's philosopher in a sound truck is simply, at least in legal terms, off on a 'frolic of his own'. He is attempting to impose a common cooperative venture upon the basis of mere proximity, and nothing could be further from the actual meaning of Rawls' account. Cf. the account given earlier in this chapter of the structure of Rawls' account of obligations.

51 Dworkin, *Law's Empire*, loc. cit., 196.

52 *Ibid.*

At first glance, Dworkin's account appears profoundly conservative, reactionary even, with its emphasis upon the history of social practices.⁵³ Even a cursory glance at the history of our social and legal practices of family suggests that the family has been in the recent past and remains in the present a profoundly inegalitarian institution, one predicated upon relationships of domination and subordination rather than independence and equality. Dworkin, however, seeks to deflect the force of this criticism by his emphasis upon the interpretive attitude. Thus, he suggests the 'raw data' of our actual practices of family, past and present, are not conclusive of an argument about the obligations of family.⁵⁴ Rather, the interpretive attitude requires that we assume that the practice of family

*serves some interest or purpose or enforces some principle . . . that can be stated independently of just describing the rules that make up the practice.*⁵⁵

At this juncture, it is critical to acknowledge that, at least as applied to social practices such as marriage and family, profound similarities obtain between Dworkin's account and the interpretation I have offered of Rawls' account of obligations generally in this context. Rawls, like Dworkin, grounds his account in social practices or institutions, indeed emphasizes the need to examine the rules of the practice in question. The fundamental distinction between Dworkin's account and that of Rawls lies in Dworkin's conception of the interpretive attitude and of its role in legitimating and justifying the practice itself. Whereas Rawls argues that no social practice or institution is capable of generating obligations unless it is reasonably just, indeed, argues that

*unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind*⁵⁶

Dworkin asks that we embark upon a theoretical evaluation of the practice itself in order to determine what integrity requires, applied to that specific practice. We must attempt to ascertain the interests served by the practice, impose meaning upon the rules involved in it, and, on the basis of the interpretive attitude, seek to restructure it in terms of that meaning. We must, in other words, generate an ideal account of the practice.

⁵³ This concern is reinforced by the fact that Dworkin explicitly acknowledges that what he terms associative or communal obligations are more conventionally known as obligations of role. *Ibid.*, 195-6. Particularly with respect to women this seems less than a promising beginning given the degree throughout our history to which women have been so thoroughly identified with and constrained by their concrete social roles especially those of wife and mother as to have been denied individuality and the potential to occupy other roles.

⁵⁴ *Ibid.*, 197.

⁵⁵ *Ibid.*, 47. Certainly the classic social contract theorists, and most particularly Rousseau, would agree with him in this. Indeed, Rousseau in particular offered a profound and detailed account of the purpose or value of family. See Ch. 8 & 9.

⁵⁶ Rawls, *A Theory of Justice*, *loc. cit.*, 343.

GENERATING AN IDEAL THEORY ACCOUNT OF MARRIAGE AND FAMILY

At what Dworkin terms the 'preinterpretive stage'⁵⁷ what is sought is broad communal consensus concerning the parameters of the practice, indeed he suggests an interpretive community requires consensus at this at this level if constructive interpretation is to be possible. (One wishes here to inquire how one defines the relevant community, a threshold question, but one which is critical. Surely the problem in contemporary pluralist states is that there are many interpretive communities, particularly with regard to practices as central as that of family.⁵⁸) Given the fact of pluralism our question must be this. Does broad consensus exist within political communities such as the United States and Australia concerning the parameters of the institution of marriage? Marriage is conventionally identified as the voluntary union of one man and one woman for life for the purpose of procreation and the rearing of children. It requires both a public ceremony in which vows are exchanged between the parties and subsequent sexual relations, to consummate the marriage. (There are, of course, dissenting voices, ranging from those who argue that marriage simply institutionalizes sexual access to women and their oppression⁵⁹, to those who argue that the concept ought to be extended to permanent homosexual relationships or who argue that procreation is/ought to be irrelevant, however I suspect that the conventional account would be accepted even by dissenting groups as accurate enough.) More importantly, our legal, social and cultural traditions define marital relationships in particular and family relationships more generally as profoundly and utterly private. Such relationships represent at their foundation a realm in which law intervenes at its peril. Here, to a far greater extent than elsewhere, freedom of choice prevails, even though the emphasis upon freedom of choice coexists with an equally fundamental belief that in marriage one individual, the wife, exchanges her independence or autonomous existence for the support and protection of the other individual, the husband. Finally, and equally significantly, such practices are seen as fluid and emotional, both structured and unstructured. Rules, as such, are perceived as inappropriate, incompatible with the intimate nature of the practice as such, although authority, most particularly the authority of the husband and father is perceived by many as critical and central to the coherence and stability of the practice.

Dworkin's second stage is substantially more complex. At the second stage, it becomes necessary to produce an argument or arguments justifying the main elements of the practice as identified at the preinterpretive stage. The account given at the preinterpretive

⁵⁷ Dworkin, *Law's Empire*, loc. cit., 65-73. In what follows, I shall attempt to follow the method suggested by Dworkin in these passages, become what he terms a philosopher of marriage and family.

⁵⁸ Cf. R.L. West, 'Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement', 54 *Tenn. L.R.* 203 (1987).

⁵⁹ C. Pateman, *The Sexual Contract*, Stanford, Stanford Univ. Press, 1990. A. Dworkin, *Intercourse*, London, Martin Secker & Warburg, 1987.

stage included only those elements about which broad general consensus might reasonably be thought to exist. At the interpretive stage, particularly within pluralistic communities such as our own, we must confront the fact that we may, in fact, not be dealing with a discrete practice, but with a group of practices which, while they share common elements, differ profoundly in the social meaning ascribed to those elements. Among many communities, for example, marriage is seen as a relationship in which one individual, the woman, promises to obey the other individual, in exchange for his support and protection for her and for any children she may bear him. Families of this sort are characterized by their affirmation of conventional gender roles and by emphasis upon the woman's responsibility for child rearing and domestic labour. At the other extreme, marriage may be identified simply as a companionate affective relationship between adult individuals. For such couples the relationship of the adults is substantially more significant than the conventional emphasis upon procreation and child-rearing, indeed, the procreative role of the family may be irrelevant. In some cases such relationships are fundamentally egalitarian in character, in others less so. Between these extremes lie a variety of mixed practices. Still other groups or individuals argue for the extension of practices like marriage and family to incorporate more or less informal relationships, to communal 'families' or to stable homosexual and lesbian relationships, particularly where the children of either partner live in the home. Polygamous marriages, while legally proscribed in countries such as Australia and the United States do persist among some groups and are recognizable as family practices, and arranged marriages remain relatively common among some subcultures. Finally, the single-parent family is, as a matter of social fact, now commonplace. Indeed, given the range of practices to which, even within contemporary societies, it is intuitively appropriate to apply the term family, it often appears that the only truly universal features characteristic of the range of practices identified by the terms marriage and family may be summed up by the terms private and intimate, or emotional.

Even identifying one or more paradigm cases of marriage and family is profoundly difficult. The account of marriage and family relationships provided by early social contract theory is surely one paradigm, and one which was enforced by law until relatively recently. Another paradigm is that of the traditional family, with its male breadwinner, its female homemaker and the more or less obligatory two or three children and the family pet. These two paradigms may, of course, substantially overlap. We may, perhaps, perceive an emerging paradigm in the dual career family with its superficially egalitarian ideology of marriage and family life and its theoretical emphasis upon the sharing of responsibilities in all spheres. Still another paradigm (although not one we would wish to recognize as acceptable) may be found in the violent or abusive family.⁶⁰ Finally, of course, a significant contemporary paradigm (although one culturally defined as 'abnormal') is the single parent family.

Because of the wide variety of concrete practices concealed within terms like marriage and family, constructive interpretation becomes profoundly difficult, in part because no settled paradigm prevails and no one practice of family predominates. I am not in the position of Dworkin's philosopher of courtesy, who is able to begin with discrete acts which are taken as paradigms of courtesy. I have, however, no alternative but to begin, using the elements which appear to typify the preinterpretive stage as a guide. Marriage, on the conventional account, represents the voluntary union of one man and one woman for life. In what may be found the value or purpose of that union? Upon what basis may our practices of family be justified? At the preinterpretive stage, the purposes given were procreation and child-rearing. Further, marriage itself is marked by the voluntary exchange of promises or vows, by the necessity for sexual relations, and by some degree of economic interdependence. These demands can, quite clearly, be met by a great variety of concrete practices, ranging from the wholly traditional to the egalitarian to the profoundly abusive. Common sense, therefore, suggests that the justification accepted at the preinterpretive stage is insufficient to confer meaning or value. The two features noted as universal, the emphasis upon privacy and intimacy may, however, be more helpful. They epitomize our profound cultural belief that a sphere of individual freedom is essential to a meaningful and truly human life, a sphere where choices and decisions can be made wholly upon the basis of the individual's beliefs concerning a life that he or she perceives as personally meaningful. I note here a number of difficulties with our emphasis upon privacy and intimacy. First, human relationships are involved and the choices and decisions involved inevitably concern the sort of relationship one individual desires to have with another or with several others and how that individual desires those others to respond. Second, where children are involved the concrete choices and decisions of the adult individual or individuals may well be wholly or partially determinative of the future lives and options of those children. Because, ideally, having children represents both a wholly private and personal decision and one which contributes immeasurably to the value of the individual life, it seems likely that the procreative role of the family is intertwined with our cultural paradigms of privacy and intimacy, that it represents a significant part of the social meaning or value of such practices.

If our conclusions at the interpretive stage seem, perhaps, less substantive than might be ideal, we do, nonetheless, seem to have extracted a core of meaning or value characteristic of a wide range of cultural practices which may be subsumed under the rubric of marriage and family. The characteristics of privacy, intimacy, interdependence and procreativity are so intimately intertwined with our traditions that it is difficult to imagine using the terms family and marriage absent these values. According to Dworkin, at *'the postinterpretive or reforming stage'* we adjust our sense of *'what the practice really requires so as better to serve the justification [we accepted] at the interpretive stage.'*⁶¹ At the interpretive stage, we tentatively accepted as justifications for practices such as marriage and family, the need for a private sphere of intimacy and emotion, a realm in which individuals could in fact strive to create value and

⁶¹ Dworkin, *Law's Empire*, loc. cit., 66.

realize a form of life they found personally meaningful. We accepted as well that for many individuals a critical source of value and meaning might be found in the choice to have children and rear a family. Accepting these tentatively as justificatory, we must, according to Dworkin, now strive to determine what the practice 'really requires' if these values are to be realized. Here, it is necessary both to examine concrete practices and traditions and attempt to ascertain whether, on some plausible interpretation, they do in fact serve these values, and to suggest the form and shape the practice 'really requires' if it is to be perceived as valuable. The central element in our justification was the need for a sphere of life in which individual choice could be seen as determinative, in which people could in fact realize a life they found good for themselves. At the interpretive stage we noted two problems with this justification: that individual choices and decisions invariably implicated others and, given the fluidity and intimacy of family relationships, inevitably involved beliefs or preferences concerning how others ought to behave, and that, where children were involved, the beliefs and attitudes of adult family members was likely to be wholly or partially determinative of the options open to the children in later life.

Can we imagine a way in which our cultural practices of family might be restructured so that they may both serve the justification accepted at the interpretive stage and simultaneously avoid the problems associated with it, including its capacity to conceal and institutionalize oppression? What elements appear, intuitively, to be critical in such a restructuring? Here, it becomes critical to draw upon other concepts widespread in our cultural vocabulary. Dworkin identifies a number of the central features necessary for legitimacy in his discussion of associative obligations, elements such as reciprocity and the sense that obligations are uniquely owed to group members as individuals, that they are personal in some sense, and reflect genuine and equal concern for the welfare of group members, taken one by one.⁶² Even these, I would argue are not enough, prove inadequate to legitimate, at least in practices such as family. Too much is left unsaid. Perhaps more critical, if one is to attempt a coherent justification for practices such as family, is the need for an authentic conception of equal respect as a foundation for family relationships. Not only must each family member act in a way which manifests equal concern for the well-being of other family members, as individuals, each family member must act in a way which manifests equal respect for the actual or potential capacity of each family member to form and act upon a meaningful conception of how his or her life should be lived.⁶³

⁶² *Ibid.*, 199-201.

⁶³ At one time, it should be noted, Dworkin's conception of equality was summed up by the phrase '*equal concern and respect*' and he identified concern with our human capacity for suffering and frustration and respect with our capacity to form and act upon intelligent conceptions of how our lives should be lived. See *Taking Rights Seriously*, *loc. cit.*, 272 and, more generally, 272-78. In recent writings all references to equal respect have been dropped.

Given the intimate and fluid nature of family life, its foundation in emotion and procreativity, I would argue, equal respect is absolutely critical, even if it may, intuitively, not be thought applicable to some aspects of family relationships. Our justification for family life emphasized the need for a sphere of privacy, for a realm in which individuals were able to realize a form of life they found meaningful, as well as the presence of emotional bonds between those individuals. We noted the danger, the fact that, most particularly in intimate relationships, the preferences of one individual inevitably implicated the roles and responsibilities of others. Concern, even equal concern, for the well-being of another, may well be exercised in a way which fails utterly to respect the capacity of that individual to form and act upon a meaningful conception of how his or her life should be lived. It is, I believe, inevitable that, however deep and intimate the bonds between individuals, they nonetheless remain distinct individuals with interests and ends of their own which warrant respect. No one individual is ever entitled simply to assume his or her ends and purposes are of greater importance than those of another, or that he or she is uniquely placed to determine the interests of another. I think here, for example, of those two career families in which one individual assumes that his or her career is of greater long-range significance and that, as a consequence, where the demands of family life conflict with the demands of employment, such sacrifices as must be made fall to the other.⁶⁴ While concern, even equal concern, may be wholly sincere in such relationships, what is lacking is respect for the ends and purposes of another. Ultimately, therefore, absent respect, concern must inevitably fail to become equal concern, however sincere the beliefs of group members. For clarity, however, particularly where, as discussed in Chapter 5, so much turns upon what the group 'assumes', it is essential that concern and respect remain conceptually distinct. The concepts involved are already open-ended and inherently contested. Confusion between them would make the interpretive project untenable.

The need for a conception of equal respect, I shall argue, is particularly critical where the interests of children are involved. While this may appear counter-intuitive, when one considers what is at stake it is, in fact, entirely reasonable. Because children are by definition not yet fully developed individuals, may lack rational ends and purposes of their own, an adequate conception of equal concern superficially appears far more important where their interests are involved. Common sense suggests that it is concern for their welfare in both the long and short terms which ought to guide parental actions, suggesting that equal concern is paramount. This is, in fact, simply wrong. This can be illustrated in what may appear a dramatic way by the example of a child who is to some extent, physically or mentally handicapped. Concern, in such cases, pulls toward protection from risks, towards an attempt

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In purely monetary terms, of course, it may well be that the most economically rational decision for the family as a whole is to proceed upon this basis, however Dworkin's model emphasizes that even equal concern must be fully individualized. Concern for the welfare of the group as a whole does not legitimate, it must be personal, for individuals as such. *Law's Empire*, loc. cit. 199.

to ensure that child is exposed to no greater risks than a normal sibling. Yet more and more we are coming to recognize that too often concern imperceptibly slides into over-protectiveness, that it frequently cripples rather than enhances potential. To some extent risk taking appears to be critical to normal development, has the capacity, within reasonable bounds, to expand potential. Something of the same sort is at work in Dworkin's example of a family whose traditions prescribe that girls require greater protection in all aspects of family life than do boys. The impulse towards protection, towards excessive paternalism, while understandable, and while it may be a plausible interpretation of equal concern, fails in both cases. What is not recognized is the need for equal respect, for a principle guiding paternalistic conduct which takes into account the fact that children are in the process of becoming mature individuals with an intelligent conception of how their lives should be lived and that equal concern which is not counter-balanced by a meaningful conception of equal respect is likely to render this project at best, more difficult and tenuous, at worst, self-defeating.

I conclude, therefore, that at the post-interpretive level, any intelligible justification for our practices of family must incorporate a developed conception of equal respect. I am inclined, also, to suggest that Dworkin's general account of associative obligations must be perceived as incomplete without a meaningful conception of equal respect. It is not enough, I would argue, for the group to assume, however sincerely, that its roles and rules are equally in the interests of all, that they manifest equal concern. Far more important is a requirement that, *at the very least*, the group assume that its roles and rules manifest equal respect for the *capacity of individuals to form and act upon an intelligent conception of how their lives should be led*.⁶⁵

Indeed, I would argue further with respect to family at least, that the demand for equal respect is implicit in the justifications for the practice we accepted at the interpretive stage. As will be recalled, at the interpretive stage we acknowledged the critical importance, in our cultural traditions, of a developed idea of family privacy and we connected the emphasis upon privacy with our belief in the importance for each individual of a sphere of life in which that person could create meaning or value, realize a life he or she believed worthwhile. Privacy, however, is not valuable in and of itself, to the extent that it represents an independent purpose or value, it does so because of what it makes possible for people.⁶⁶ It provides one of the essential preconditions if individuals are, in fact, to form and act upon intelligent

⁶⁵ Certainly a right to equal respect was implicit in arguments Dworkin earlier made for a right to moral independence, and to my knowledge he has not modified or abandoned those arguments. See 'Do We Have a Right to Pornography' in *A Matter of Principle*, *loc. cit.*, 335, 353.

⁶⁶ Cf. Dworkin's comment that '*liberty seems valuable to us only because of the consequences we think it does have for people: we think lives led under liberty are better lives just for that reason*'. 'The Place of Liberty', *loc. cit.*, 2.

conceptions of how their lives ought to be led, and it is worth preserving only to the extent that it serves this underlying purpose. Quite obviously, this is particularly crucial with respect to children, but it necessarily applies to adult relationships as well. To the extent that an intelligible and fully adequate conception of equal respect is excluded, the justificatory potential of the conception of privacy collapses. Indeed, to the extent that privacy is allowed to conceal dominion and the crippling of individual potential, it is devoid of value.

Similarly, we recognized that among the core values of practices such as family was their role in securing and enhancing a sphere of intimacy and affect, of, in short, love. Yet love has destructive potential as well as life-affirming potential. Without mutual respect, without full recognition that the loved one has the capacity to form and act upon an intelligent conception of how his or her life ought to be led, without recognition that his or her humanity is ultimately rejected if this potential is thwarted or rejected, love becomes destructive. Again, nowhere is this more critical than with respect to children.⁶⁷

Any acceptable postinterpretive account of marriage and family relationships must, therefore, be founded upon mutual respect, and upon an adequate conception of the importance of equal respect in family life. Earlier, we sketched many practices which might plausibly be considered family practices in our culture. Now, we must consider whether, or indeed if, those paradigms can be reconciled with the justifications we accepted at the interpretive stage, and with our heightened perception of their purpose or value as developed at the postinterpretive stage.

Some of the paradigms we suggested remained current in our culture clearly cannot be reconciled with any acceptable justification. Neither the account of family derived from early social contract theory nor that manifest in the violent or abusive family can be reconciled with any meaningful conception of equal respect. This is in fact an interesting distinction. The account of family derived from early social contract theory, may, in fact, be thought to manifest a conception of equal concern, at least if family groups organized upon this basis sincerely assume that the roles and rules involved are equally in the interests of all family members, taken one by one. It is respect for the ends of the other which is wholly absent.⁶⁸ The violent or abusive family is quite simply hopeless, absent both concern and respect, equal or otherwise. It, may not, however, be absent love, albeit in a deformed or distorted form. Traditional families come in many different forms, as do dual career families and single parent families. Where distinct and different roles are freely and consciously chosen, where

⁶⁷ Cf. Rawls' emphasis upon the role of love in moral development and especially upon the development of self-respect and self-esteem. Noteworthy in Rawls' account is the recognition that love ought to be guided by the demands of justice, by the recognition that the child will become a free and equal moral person. *A Theory of Justice*, loc. cit., 462-67.

⁶⁸ Cf. the discussion of early social contract theory and particularly that account developed by Rousseau in Ch. 7 & 8.

individuals deal with one another as individuals, realize mutual and equal respect, not as occupants of the ideal/typical roles more or less characteristic of the practice, but as unique and irreplaceable individuals attempting to realize in practice a valuable life for themselves, they can clearly be reconciled with the justification developed at the postinterpretive level. Here, of course, we recognize as well the potential for radical transformation of the practice itself, the acknowledgment that the roles depend not upon biologically assigned characteristics but upon the belief of the individual that they embody a meaningful life, an intelligent conception of how his or her life ought to be lived. That, at a minimum, demands that they be thought about, subjected to rational and critical evaluation, not simply accepted as natural and inevitable, and equally, where children are concerned, demands that such roles be recognized and presented as one possibility among many. Where it cannot be said that roles are freely and consciously chosen, where, perhaps, individuals are perceived substantially in terms of their correspondence with the ideal/typical roles characteristic of the practice, where the content of the roles themselves enhance the capacity to develop and pursue an intelligent conception of a valuable life in some individuals while wholly or partially foreclosing it in others, the position is otherwise. Frequently, as well, where this is the case ideal/typical roles are presented to children, not as one choice among many potential choices, but as natural or inevitable, or worse, imposed upon them. I think here of Dworkin's patriarchal family. While it may, as he suggests, be compatible with a sincere, if defective, conception of equal concern, it cannot be reconciled with any viable conception of equal respect, no matter what the group may or may not assume and how sincere their beliefs. A meaningful conception of equal respect in this context must involve respect for the individual as one who is equally capable of forming and acting upon an intelligent conception of how her life ought to be lived. Where paternalism is predicated upon biological sex, as in Dworkin's example, it implicitly denies *equality* of respect.

What I have attempted to do thus far is apply the method of constructive interpretation as developed by Dworkin to a concrete social practice or group of practices, that of family. Doing so, I have identified the values or purposes served by the practice, and attempted to develop a critical justification for the practice itself. Significantly, I believe, I have shown that the integrity of the practice depends, not only upon those elements which Dworkin argued were essential to generate what he terms 'fraternal' obligations, but upon a developed conception of equal respect.⁶⁹ Without a developed conception of equal respect, family privacy cannot be justified, most particularly with regard to its procreative role. The value of privacy, to the extent it has value, lies in the space it affords the individual to develop and act on a meaningful conception of an appropriate life for himself or herself.

69

It may be significant here that in his discussion of associative obligations as they pertain to family practices, his concrete examples deal with obligations of children to parents and those between brothers. Those of parents to children and those between spouses do not figure in the discussion.

THE UNJUST FAMILY

Does the demand for equal respect apply more widely as Dworkin once thought it did? I believe so, however it is sufficient for present purposes that I have established its pivotal importance in any plausible justification for family practices. What follows from this for any account of family law capable of meeting the demands of integrity? An immediate barrier arises because the arguments presented suggest that many concrete family practices which are believed utterly fundamental and beyond question among some cultural groups within the wider community are inherently incapable of giving rise to any obligations whatever. I am not happy with this analysis, not, it must be stressed, because I believe such practices are either legitimate or justifiable, but because it seems to me that this analysis fails to capture the problem with sufficient precision. The problem, particularly with abusive families or, for that matter, patriarchal families such as that in Dworkin's example, is that one or more of the individuals within the family have simply got it wrong. There are obligations, most particularly where children are concerned, and surely between spouses, but those obligations have not been honoured. Social practices do not go away simply because they are deemed non-obligatory, rather the community must sort out the mess created by them, and deeming them fundamentally non-obligatory does not seem a promising start. Dworkin's account may, of course, offer a thoroughgoing justification for legally declaring such relationships at an end, it does not help us determine an appropriate course of action, given that the relationship is at an end and the needs of the individuals must be considered.⁷⁰ Consider the situation which might arise where, let us say, a wife and children escape from a violent husband, or somewhat less dramatically, a rigidly authoritarian husband who believes himself justified in demanding utter compliance from his wife and children. Are we to say, as would seem probable on the basis of Dworkin's account of associative obligations, that such families are devoid of obligations? That analysis would *also* suggest that the husband has no responsibility to provide for the support of his former wife and children, that they must, henceforth, fend for themselves or be supported by the state. It may also suggest that they can be left to extricate themselves from the situation, a position which is untenable where children are involved, since they simply cannot do so.⁷¹ Both propositions are, it seems to me, strongly counter-intuitive, and would be extremely difficult to reconcile with the common sense perceptions of the community at

70 I raise here, but do not address in detail, the possibility that Dworkin may have pressed too hard upon the notion of associative communities. It may be, in fact, that despite the initial persuasiveness of Dworkin's analogical reasoning, the differences between different types of 'associative communities' are as striking and critical as their similarities.

71 I think here of the comment by Chief Justice Rehnquist in *DeShaney v. Winnebago Soc. Serv.* 489 U.S. 103 L.Ed. 2d. 249, 262 that '*while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*' Joshua was, after all, only four years old, and to characterize the world of a four year old left in the custody of a parent known to be violent and abusive as free beggars the imagination.

large.⁷² If, in such a situation, there are no obligations, law would appear to provide very few answers. While each adult could demand that property which was properly his or hers be restored to him or her, and claim damages for tortious wrongs, any legal obligations for ongoing support, for example, would necessarily be imposed from without. They would have no foundation in the practice itself, must be independently legitimated, perhaps upon the basis of detailed statutory provision for family relationships and for the obligations appropriate to such relationships. A proposition such as this seems, however, to conflict profoundly both with the pluralistic nature of contemporary communities and with the best justifications we can give for practices of family. If a significant part of our justification for family practices in fact follow from privacy a detailed, state prescribed regime, such as that suggested above seems incompatible *unless the obligations enforced are in some sense generated from within the practice itself*. This may, in fact, represent an extremely important distinction between communities such as families and communities such as the contemporary nation state.

Dworkin therefore cannot, I believe, argue simply that even those practices which are devoid of integrity are incapable of generating obligations. Rather, a very much more complex argument is required. We have the required standard for the integrity of the practice in the justification derived at the postinterpretive stage in our constructive interpretation of the practice of family.⁷³ We might term this an ideal theory of family, an outline of the conditions which families must meet if the internal roles and rules the members believe to obtain are in fact capable of imposing genuine obligations. When we examine particular practices which might reasonably be thought to represent family practices, using the criteria explored and developed at the preinterpretive and interpretive stages, and find that these practices cannot be reconciled with the justification developed at the postinterpretive stage, the problem is not that no obligations exist. Rather, the problem is, as a common sense approach suggests, very much more complex. While, undeniably, the particular roles and rules we have found to be profoundly defective do, indeed, have no binding force, are void *ab initio*, it does not, however, follow, that, *as an example of family*, the relationship between the individuals concerned is devoid of obligations. Rather, given the fact that the relationship between the individuals is

72 These are of course the same common sense perceptions relied upon by Dworkin in commenting that '*most people think that they have associative obligations just by belonging to groups defined by social practice, but that they can lose these obligations if other members do not extend to them the benefits of belonging to the group.*' *Law's Empire*, loc. cit., 196.

73 I believe that the postinterpretive justification developed necessarily goes to the integrity of the practice, not simply to its justice. My reason is simple. Within liberal culture, beliefs concerning family privacy and the rationale behind these beliefs are inseparable from an intricate network of cultural beliefs concerning the individual, the autonomy of the individual, and in particular, the capacity of the individual to create value. They are not compartmentalized and discrete, cannot be confined to the institution of family as such. Rather, they are precisely those values that liberalism honours most fundamentally and generally, those that, above all else, it seeks to guarantee and protect.

recognizably a family relationship, albeit distorted and destructive, what follows is that wider institutions, particularly legal and political institutions, are themselves obliged to seek to restore the victims to positions approximating those they would have occupied had the particular instance of family generated internally valid obligations. This public obligation arises by virtue of the fact that our public culture accepts and recognizes practices of family, indeed, given the degree to which our public culture relies upon such practices in socially assigning burdens and benefits, it cannot simply disregard corruptions or distortions of those practices. It may declare certain obligations between particular individuals at an end, but what remains are the background obligations central to the practice in its ideal form. Here, it is critical to note that this distinction makes sense of our desire in such circumstances to distinguish between those individuals who have, in fact, sought to honour at least some of the obligations inherent in the practice of family, and those who have failed utterly in this regard. It enables us to speak in the language of victims and oppressors, a vocabulary otherwise unavailable to us. I do not know what language is available if the practice, as such, is simply incapable of generating any obligations. Even in Dworkin's 'Mafia example',⁷⁴ there are almost certainly some obligations *inter se* which are reasonably just and which ought to be enforced, some of those between husband and wife or between parents and young children.

Where, perhaps, the particular family can be reconciled with an adequate conception of the practice taken as a whole, where it does meet the test of integrity, even if it is defective in certain respects, it will be insufficient to proceed simply upon the basis of our abstract ideal account of family. Rather, it will be necessary, should disputes arise, to examine the roles and rules as they are present, to examine the obligations upon the basis of which family members have apparently conducted their relationship. (Again, because of the centrality of such practices, the state cannot simply wash its hands of the matter.) To the extent that these concrete roles and rules and the obligations which flow from them are consistent with our abstract ideal account, disputes among family members ought to be resolved upon this basis. Where they are not, the defective obligations must be ignored, and it will be necessary to proceed upon the basis of those which would have been present on the basis of our abstract account. In practice, therefore, the approach required is profoundly similar to that we used in extending Rawls' principles of justice to the family, and, as with Rawls, we recognized both the impossibility of avoiding the concept of fault and the necessity to ensure that our inquiry into fault is particularized, makes use of the concepts implicit within the particular family, or, to the extent those are defective, makes use of those which follow from our abstract ideal theory account. This similarity, may, of course, be coincidental, or it may, as I believe to be more likely, signal a profound similarity between the deep structures of their theories and suggest that Rawls' account of the obligations generated by the principle of fair play and Dworkin's account of associative obligations are substantively far more similar than appears upon the surface. To the extent that these approaches apparently differ, the difference may be

accounted for by the apparent absence, in Dworkin's work as a whole, of any discrete and developed theory of paternalism, although I believe such a theory to be implicit in the justification we accepted at the postinterpretive stage, and by the fact that we have not yet directly considered the issue of distributive justice within the family in dealing with Dworkin's theory of associative obligations.

RECONCILING EQUALITY OF RESOURCES AND ASSOCIATIVE OBLIGATIONS

At this juncture, it becomes imperative to consider the congruence between Dworkin's theory of associative obligations (as applied in the context of the practice of family) and his background theory of equality of resources as explored in Chapter 3. As we saw, Dworkin argues that a government dedicated to equal concern has an obligation in the scheme of property it designs to secure to each citizen an equal share of resources to invest or consume as he or she wishes. Likewise, as I have argued earlier, to disregard the role of the family as a distributive mechanism and its impact upon distributive justice more generally is, in the real, real world to construct an account of justice which remains profoundly gendered and irrelevant to women. In Chapter 3, I argued that a serious problem with Dworkin's account of equality of resources lay in the fact that as currently set out it apparently disregarded the impact of women's culturally assigned responsibility for domestic labour and parenting upon their share of resources, given that equality of resources '*assumes that people's wealth should differ as they make different choices about investment and consumption*' and indeed more generally concerning the particular balance of work, leisure and consumption they find appropriate.⁷⁵ In that context, I emphasized an element which has traditionally played and continues to play a significant role in our cultural practices of family, the idea that a woman who devotes her life to domestic labour and parenting is not entitled to any share of resources beyond those which her spouse elects to make available. While she is entitled to support and to protection for herself and their children, our practices of family uniformly deny that she is, in any sense, entitled to a wage. Rather, on current assumptions concerning the meaning of terms such as work, leisure and consumption, a traditional homemaker would apparently devote the whole of her time to leisure and consumption.

In the real, real world, most particularly should her spouse die or her marriage collapse, Dworkin's account of equality of resources at least superficially suggests that despite her actual economic disadvantage, she nonetheless remains equal as equality is understood by equality of resources. Now it is time for a much closer look, for a sustained effort, given our abstract account of the associative obligations implicit in our cultural practices of family, to integrate equality of resources into that account to the extent that this can be done. It is, I believe, important to address immediately a threshold question. On the basis of equality of resources as Dworkin has presented it, it might seem that the obvious approach would be for a woman contemplating entry into a long term relationship to negotiate directly with her

intended partner in respect of compensation for child-bearing, domestic labour and parenting.⁷⁶ Given that, absent her willing cooperation, or the cooperation of another suitable partner, her intended partner will be unable to form a family⁷⁷ it would appear that the provision of such services might be said to form part of the ongoing market Dworkin envisions after an equal initial division of resources. All such arguments, however, face a number of immediate barriers. Dworkin emphasizes that the reciprocity involved in associative relationships is profoundly abstract, that any endeavour to concretize the sort of reciprocity required, as the argument above would demand,

*would make [marriage] possible only between people who shared a detailed conception of [marriage or family life] and would become automatically more contractual and deliberative than it is, more a matter of people checking in advance to see whether their conceptions matched well enough to allow them to be [married].*⁷⁸ [Dworkin comments further that] *friends or family or neighbours need not agree in detail about the responsibilities attached to these forms of organization.*⁷⁹

If, therefore, we simply suggested that equality of resources required that the parties define their concrete financial relationships in advance, that they make financial provision for child-bearing, for domestic labour and for parenting, we would be going a substantial way towards making our cultural practices of family more contractual and less associative than Dworkin suggests they are, superimposing the concrete and detailed obligations of contract upon the diffuse and open ended reciprocities Dworkin argues are characteristic of associative obligations. Might we, indeed, have marched up the hill of constructive interpretation only to find it to be indistinguishable in certain respects from contractual interpretation?⁸⁰ If the foundation of marriage ought to be, in fact, contract, if equality of resources is to obtain, if family life is to be perceived as originating from contract, in one significant area at least, Dworkin's account of associative obligations appears to be at least in part superfluous.⁸¹ It

⁷⁶ We are, of course, moving here towards a contractual account of marriage with all the problems that entails.

⁷⁷ I leave aside the possibility of a surrogacy arrangement, adoption, and/or the combination of one or more of these with the presence in the home of an employed housekeeper. Such permutations are well beyond the scope of this thesis.

⁷⁸ Dworkin, *Law's Empire*, loc. cit., 198.

⁷⁹ *Ibid.*, 199.

⁸⁰ Given contemporary trends in contract law, and, in particular, the current predominance of equitable considerations almost to the exclusion of many traditional contract principles perhaps courts are currently moving towards an interpretation of contract which renders it almost indistinguishable from Dworkin's account of associative obligations.

⁸¹ Ultimately, it seems to me, this alteration might well cost Dworkin either his account of associative relationships or his account of equality of resources simply because a theory incorporating two fundamentally incompatible elements lacks sufficient coherence to be viable.

becomes, therefore, essential to explore whether and if Dworkin's background theory of equality of resources can be incorporated into our postinterpretive account of the justification we derived for family practices upon another basis.

Dworkin argues that equality of resources is the best interpretation of the background obligation of governments to treat those they govern with equal concern in the scheme of property rights it designs. He argues as well that concern, most particularly equal concern, is critical for the existence of associative obligations. Equal concern, therefore, seems a logical candidate for the necessary bridge between these elements of Dworkin's theory taken as a whole. Our aim is a coherent account reconciling superficially inconsistent elements.

Dworkin's account of equality of resources is, as we saw earlier, designed to provide, on the ideal theory level, a account of what equality of resources might look like, and thus, in turn, provide a standard against which real world distributions might be compared. In looking at equality of resources we recognized that, at the ideal theory level, all human relationships were represented as exchange relationships, relationships predicated upon contract and conducted between independent and rational individuals dedicated to maximizing their own interests as they perceived them. *Contra* Dworkin I argued that equality of resources apparently offered few if any answers for those individuals, particularly women, whose economic inequality flows, not from lack of natural endowments, but from the impact of their culturally assigned responsibility for domestic labour and parenting upon their capacity to compete in the marketplace. To a substantial extent, women's inequality follows from their own perception of their obligations to their children and spouses and from the institutionalization of expectations concerning their private roles. It follows, that is, largely from moral constraints which inhibit competitive capacity. Now we must try to establish the precise status of these moral constraints or associative obligations within the framework of equality of resources. Dworkin's account of associative obligations is, as we saw in Chapter 5, designed to establish the circumstances under which citizens have a genuine moral obligation to obey the law. We must now attempt to understand the role 'moral obligations' such as those involved in political community play in equality of resources. Might it be legitimate to argue that equality of resources must take into account the effect of these moral obligations upon access to resources? Dworkin argues that while legal constraints are part of the circumstances of the individual and relevant to equality as understood within equality of resources given that they restrict the possibilities which would otherwise be open to that individual, felt moral constraints belong to personality and are for that reason irrelevant. What does he mean by this? In addressing the distinction, he notes that a 'complication' arises because of the fact that many people believe that they have a moral obligation to obey the law. This complication is resolved by arguing that, for the purposes of equality of resources, legal constraints *'are to be viewed as Holmes' "bad man" would view them - as threats putting up the*

cost of the actions they forbid.⁸² Given that Dworkin's account of associative obligations is designed to show the circumstances under which political community has the capacity to generate just such obligations, and given his explicit statement that for the purposes of equality of resources even our obligations to obey the law are to be viewed as threats putting up the cost of the actions they forbid, I can see no compelling justification for assuming that they ought to be taken into account in determining equality of resources within a family context. We explored as well obvious avenues for extending equality of resources, including such ideas as wages for household labour and parenting. Now we see that these easy and obvious avenues are hard to reconcile with Dworkin's account of associative obligations, that they either superimpose concrete contractual obligations upon marriage and family life or leave equality within families unaddressed. We must, therefore, explore alternative approaches.

It is appropriate to begin by asking how a government dedicated to realizing equality of resources in the scheme of property it designs would address these facts in the real, real world. As Dworkin comments,

*government must constantly survey and alter its rules of property, radically if necessary, to bring them closer to the ideal of treating people as equals under the best conception.*⁸³

It may follow that the issue of distributive justice for women, given our cultural traditions and the prevalence of conventional gender roles which profoundly disadvantage women in economic competition (irrespective of their talent, their motivation, and their overall preferences) is a matter which must be addressed as part of the overall scheme of property designed by government.⁸⁴ The issue is substantially complicated by two further considerations, that legislative decisions about property must respect certain fundamental individual rights, and, more importantly, that the legislature in making such decisions may pursue the collective general interest, that the legislative details are a matter of wise social policy rather than principle. So long as the scheme of property designed does not mask illegitimate discrimination which violates individual rights or operate so arbitrarily as to suggest it could serve no legitimate and coherent conception of the public interest, the requirement that government must treat its citizens as equals ought to be seen

⁸² Dworkin, 'The Place of Liberty', *loc. cit.*, 18-19, esp. n. 21, p. 19. This suggests that, for example, a wife's perception of the obligations she owes to her husband and children is simply a felt moral constraint irrelevant to equality as it is understood under equality of resources. This, however, seemingly renders associative obligations irrelevant as well, and indeed, the passage cited in the text supports this view.

⁸³ Dworkin, *Law's Empire*, *loc. cit.* 310.

⁸⁴ In Ch. 11 I argue that many, perhaps most, of these cultural factors are a consequence of inequalitarian attitudes which are deeply entrenched in our cultural traditions, and that they render the concrete preferences actually expressed 'inauthentic' and therefore illegitimate within the framework of equality of resources.

*as commending a general collective goal that respects equality of concern overall and statistically, rather than as supposing that each individual statute or regulation, judged on its own, must award each citizen something he is entitled to have.*⁸⁵

Even a constructive interpretation of the social purposes rights in private property might be thought to serve may not offer much in the way of concrete guidance. Dworkin clearly accepts as fundamental the idea that individuals have a right to use or exchange the property assigned to them under any plausible scheme of property rights free from any *general* responsibility to show equal regard for the interests of others.⁸⁶ Perhaps all that can be said is that, given our legal and social history and our political traditions, the link between individuals and that which they are able to acquire through their own energies and efforts is almost unchallengeable. The problem faced by a substantial majority of women, however, is that the family responsibilities conventionally assigned to them and honoured by them make it extraordinarily difficult for them to acquire property through their own energies and efforts.⁸⁷ If these are, indeed, simply felt moral constraints, and therefore features of personality which are, as such, irrelevant to equality of resources, perhaps women would be well advised to abandon them!

Perhaps our detour into these more general concerns was itself a mistake. While, on the one hand, distributive justice for women represents an aspect of distributive justice more generally, as does distributive justice for other currently disadvantaged segments of the population, it also seems to be an issue which cannot be addressed without attention to the family and family roles. Perhaps our question ought to be this: Given that any acceptable justification for the practice of family must, on Dworkin's arguments, incorporate a meaningful conception not simply of concern for each family member, taken as an individual, but of equal concern, can we argue that, at least within the family, any acceptable interpretation of equal concern will require an internal allocation which might be thought to reflect a plausible conception of equality of resources? If so, this may provide a more promising approach. Dworkin emphasizes the reciprocities characteristic of associative obligations, and emphasizes that these reciprocities demand that if one family member makes sacrifices for another that other has an obligation to reciprocate by making sacrifices in turn. These obligations are owed, not to the group as a whole, but to individual family members, one by one.⁸⁸ A more

⁸⁵ *Ibid.*, 310-11.

⁸⁶ *Ibid.*, 298-99.

⁸⁷ This does not, of course, mean that legislation proscribing discrimination in employment, in access to financial services and so on is in any way problematical. Given that a government dedicated to equality of concern must ensure that arbitrary discrimination is proscribed, such legislation would be clearly required by principle.

⁸⁸ *Ibid.*, 198-199.

promising account, therefore, might flow from the concept of a moral ledger introduced and discussed in Chapter 3. Dworkin notes that where individuals have an ongoing relationship, the particular example he gives is that of long time neighbours, and a conflict of interests arises, each individual decision ought to be regarded as part of a continuing series of linked decisions. Thus,

*if I forgo an opportunity in one case, because the relative loss to you will be greater, this should be entered to my credit in a moral ledger against the next decision I (or you) have to make.*⁸⁹

The concept of a moral ledger, of chained or linked decisions, appears promising applied to family relationships, even though Dworkin would appear to restrict its use to circumstances where *'the activities we independently plan, each in the enjoyment of general rights secured by property assignments, conflict.'*⁹⁰ Can an argument such as this be extended to the case where the conflict is not directly between the activities we independently plan, but arises out of the difficulty of reconciling those activities with other, hopefully shared, obligations? Dworkin argues that where such conflicts arise,

*we must act as if the concrete rights we cannot both exercise had not yet been distributed between us, and we must distribute these ourselves as best we can, in the way equality of resources commends. [Dworkin argues further that] we must calculate who would lose less in these circumstances by comparing financial costs, not because money is more important than anything else but because it is the most abstract and therefore the best standard to use in deciding which of us will lose more in resources by each of the decisions we might make.*⁹¹

Where direct financial cost are not at stake, the potential damage is to be measured in the way the market simulation test suggests, *'by asking whether you would pay more for me to stop playing than . . . I would pay for the opportunity to play.'*⁹² Where, of course, a realistic opportunity for negotiation is, in fact, present, as with neighbours or between husband and wife, people who do *'have a continuing and self-conscious relationship,'*⁹³ decisions cannot be treated in isolation and calculations of comparative cost are likely to become extraordinarily complex.

Can we incorporate something similar to Dworkin's idea of a moral ledger into our abstract account of the practice of family? Intuitively, the idea seems appealing and persuasive. Surely marriage is the paradigm case of a continuing and self-conscious

⁸⁹ *Ibid.*, 306.

⁹⁰ *Ibid.*, 302.

⁹¹ *Ibid.*, 303.

⁹² *Ibid.*, 303-4.

⁹³ *Ibid.*, 306.

relationship, one in which decisions ought to be made which strike a reasonable balance between interests and preserve equality of resources overall. Again, certain threshold questions arise. First, is what is at stake a conflict over the uses to which private property ought to be put? Dworkin, in 'Equality of Resources' was at some pains to deny that individuals have, in any meaningful sense 'property' in their own labour, in the context of discussion of whether rights over labour might be thought to be among the goods auctioned.⁹⁴ Physical capabilities are not up for grabs in that way. More recently he has suggested that the reason that rights over labour ought to be excluded from the original auction is simply because the right of individuals to use their physical capabilities, including their labour, as they saw fit formed part of the liberty/constraint system set in place before the auction began.⁹⁵ To allow otherwise would be to legitimate a form of slavery. Somehow, in the family context, we must characterize more or less precisely what is involved, in order to determine whether or not the idea of a moral ledger is appropriate. If felt moral constraints are, as I have argued above, to be seen as features of personality and irrelevant to equality as it is understood in equality of resources, what is the point of a moral ledger anyway? It would appear to be nugatory. Does the fact that, in Dworkin's example, the conflict arose because each individual had independent and independently recognized property rights which, were it not for the fact of conflicting uses, would never have come into question between them legitimate its use? If that is the case, the fundamental right of each individual to make use of his or her labour to gain further resources ought also be sufficient to legitimate its use. If the allocation of responsibilities within a family effectively destroys the competitive capacity of one individual within the marketplace, does this not represent a conflict of interests in the same sense, given the individual's right to make use of her labour as she sees fit? Does the presence of these background rights signal a shift in the meaning of the term moral, changing what would otherwise depend upon special features of personality which are irrelevant to equality to a matter of principle fundamental to equality?

Questions such as those in the last paragraph are far from easy to answers. Nonetheless, it is important to try to make sense of and reconcile these ideas. Perhaps we can say that within any marriage, adult individuals ought to make decisions about work, leisure and consumption against what might be termed the *baseline constraint* of the obligations inherent in the idea of family as an associative community.⁹⁶ (Are these obligations somehow localized, specific to the practice of family, and therefore irrelevant to our equality as citizens? Such an assumption would certainly serve to reconcile the apparent conflict, but at the cost of

94 Dworkin, 'Equality of Resources' *loc. cit.*, 304-12, and esp. 311-12.

95 Dworkin, 'The Place of Liberty', *loc. cit.*, 23-24.

96 In characterizing associative obligations as a baseline constraint I am trying to recapture a sense of their binding force, situate them sufficiently outside the individual to avoid an immediate collapse into 'felt moral constraints'. If this strategy works, they become part of the individual's circumstances and therefore relevant to equality rather than part of his or her personality and therefore irrelevant.

denying that wives *qua* wives are citizens.) These decisions have a significant bearing both upon their individual ongoing access to resources and upon the leisure time available to each of them, taken as individuals. In many families obligations to children play a definitive role in choices of this kind. Our initial difficulty arose because Dworkin emphasized that moral constraints (as opposed to legal constraints) belong to an individual's personality along with convictions, ambitions, tastes and preferences, rather than to his or her circumstances, circumstances including the resources, talents and capacities commanded.⁹⁷ This suggests a real difficulty in extending the concept of a moral ledger and, indeed, the concept of equality of resources to our account of family, despite the fact that it initially appeared persuasive. Equality of resources, after all, is, as we saw earlier, designed to be ambition sensitive, to allow the actual wealth of individuals to reflect their choices in the balance of work, leisure and consumption available, while remaining endowment insensitive so that equality is not affected by differences in ability among people with similar ambitions.⁹⁸

Now it is time to turn to a concrete example. Bob and Carol are both lawyers and have been married and engaged in legal practice for about seven years. While Carol has generally assumed the bulk of the responsibility for the household, since their incomes have permitted some household help, this was not unduly burdensome. After seven years of marriage they jointly decide to begin a family. After Delly is born Carol remains at home for six months and then returns to work. Now she finds that, despite adequate child care arrangements and some household help, she is unable to simultaneously meet her professional obligations and assume the bulk of responsibility for the household and caring for Delly. While Bob enjoys playing with Delly in the evenings and on weekends, he is unwilling to either sacrifice more of his leisure time to share the domestic responsibilities equally or to cut back on time devoted to legal work. As a consequence, and at Bob's suggestion, Carol ultimately leaves full time professional work and seeks a part time position, foregoing both the resources involved and her chance for a partnership.

What resources does Dworkin make available to characterize their resultant 'bank account' inequality? The abstract account of the associative obligations of family we developed earlier surely acknowledges that both Bob and Carol have obligations not only to each other but to any children they may have. These obligations are reciprocal, if diffuse. They arose out of the relationship between Bob and Carol, and subsequently out of the relationship of each of them to Delly. Earlier, I suggested that applied to family relationships, both equal concern and equal respect were implicit in the best justification we could provide for the institution of family. If, Bob, for example, has an obligation to treat both Carol and Delly, not only with equal concern, but with equal respect, it would follow that Carol, for example, has a right to be treated with equal concern and respect. (A question relevant here concerns the extent to

97 Dworkin, 'The Place of Liberty', *loc. cit.*, 18-19.

98 Dworkin, 'Equality of Resources', *loc. cit.*, 311.

which this 'moral right' in the family context ought to be viewed as a political right. To characterize as a right that which is incapable of enforcement is an empty idea.) These obligations, or felt moral constraints, however, belong to the personality of each, and seemingly, therefore, are irrelevant within the framework of equality of resources.⁹⁹ Bob might, for example, argue that his moral obligations, to the extent that they were relevant, to both to Carol and to Delly were fulfilled by his continuing commitment to work and to providing resources to meet the needs of his family. He is, he might argue, already making substantial sacrifices both in terms of the lessened resources available for his personal consumption and his lessened leisure. While Carol as well has made sacrifices, albeit of a different order, the *reciprocity* of their relationship is maintained. He might argue further that any inequality in terms of bank account wealth which attended Carol's decision did not diminish her equality as equality is interpreted by equality of resources. Her bank account wealth was diminished wholly as a consequence of certain features of her personality which affected the balance she preferred between work, leisure and consumption. No legal constraints put up the cost of the choices she made. So long as provision was made for the proper care and supervision of Delly (a legal constraint affecting both them equally in the formal sense) her liberty in that regard was identical to his. Why should he alter his lifestyle and diminish his access to resources, simply because she preferred a different balance of work, leisure and consumption? His *concern*, after all, led him to suggest that she cut back on work, both in her own interests, and also in the interests of Delly. He respected *her* decision to do so, even if it effectively diminished the resources available to him for his own purposes.

If the account and arguments put above are accurate, we do not seem to have made a particularly promising beginning. (In point of fact, I would suggest that we have arrived abruptly at the position prevailing in 1990.) Have we developed an abstract account of the conditions essential to legitimate our cultural practices of family only to find that equality of resources is meaningless within it? What might Carol argue? She might, of course, begin by arguing that even if his suggestion that she cut back on work so that she could meet her family obligations did show concern for her well-being as an individual, and, indeed, concern for Delly's well-being, it had in fact failed to show her equal respect, given that they had jointly agreed to have a family and given that she had as much invested in her legal career as he had in his and many of their overall ambitions were similar. She might further argue that the mere fact that he did not feel obligated to restrict his workload or sacrifice some of his leisure in order to have the time available to share in domestic responsibilities and in parenting, did not alter the fact that he had an obligation to do so within the community they shared. However,

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Dworkin comments that '*a person's liberty - the range of actions open to him free from any legal constraint - belongs to his circumstances rather than to his person or personality. . . . Felt moral constraints, on the contrary, belong to personality. A complication therefore arises in virtue of the familiar moral conviction many people have, that they ought to obey the legal constraints. I avoid this complication by assuming that legal constraints are to be viewed as Holmes' "bad man" would view them - as threats putting up the cost of the actions they forbid.*' 'The Place of Liberty', *loc. cit.*, 19.

rather than relying upon this obligation in any direct sense, or even relying directly upon the notion of a moral ledger, she might then adopt a very different tack. She might instead rely upon the language of true opportunity costs and remind him that

*equality of resources aims that each person have an equal share of resources measured by the cost of the choices he makes, reflecting his own plans and preferences, to the plans and projects of others.*¹⁰⁰

In other words, in the community they share most intimately, that of the family, he ought to test those things he needs to pursue his own projects and goals (including leisure and freedom from domestic responsibilities) against the costs his choices impose upon the plans and projects of others. To the extent that the cost of his choices to her (and to Delly) has not been brought fully into account, she has, she might argue, amassed a substantial credit in their moral ledger and this ought to count in her favour in future decisions. She might argue, that is, that he has not paid the full price of the life he has chosen to lead, is getting it 'on the cheap'. While their community is, in a sense, too small for anything like a market to operate in the literal sense, surely even here there is room for the adoption of market simulating rules for decision making. At the very least should their marriage fail, for example, by analogy to Dworkin's account of the role of a 'moral ledger' in resolving nuisance disputes between neighbours, surely this credit ought to be brought to account in the financial settlement between them.

This, in many ways, seems a more promising avenue. Just as Dworkin has argued that the resources available to any individual within the wider political community, ought, in principle, depend upon the true opportunity costs of those resources to others, we have suggested that within the micro-community of family, the same principle ought to apply and for the same reasons. We have said that just as government ought to treat its citizens with equal concern so too a family ought to treat its individual members with equal concern and respect. Are we as happy talking about the family personified as the community personified? Do we take the family seriously as a moral agent? In discussing political community Dworkin emphasizes the profound distinction between the responsibilities of officials acting as such, and the area of personal moral sovereignty to which each individual, acting solely as an individual, is entitled. What of the family? What 'official' exists with special obligations in this regard, who, within the family is allowed no latitude, is expected to act with absolute impartiality?¹⁰¹ Everyone? Perhaps, or, at the very least, every adult individual. (Do we need to resurrect the idea of the father as sovereign characteristic of early social contract theory?) Have we mounted an argument for equality of resources within the family only to find that it is totally

¹⁰⁰ *Ibid.*, 27.

¹⁰¹ Cf. Dworkin, *Law's Empire*, 172-175. Dworkin argues that we allow officials acting in their official capacity no area of personal moral sovereignty, and that the individual's normal latitude for self preference is called corruption when it occurs in an official capacity.

irrelevant, that any attempt to realize it eradicates absolutely that area of personal moral sovereignty free from the claims of others Dworkin argues is fundamental to our beliefs? The problem is this. If any feature of the family and family life is truly paradigmatic within our culture, it is our allegiance to the idea of the family as private and autonomous. Nothing, within our culture seems more unalterably private and bound up with our personal freedom and moral sovereignty than our family relationships, and it is at least some of these traditions upon which we have drawn in constructing our ideal account of family. A political official, a union official, an office holder in a club or association has a private life to which he or she can retreat, escape official responsibilities, at least for a time. Even Hercules is not a judge *all the way down*. If we insist that those within the family (at least adult family members) are bound by similar 'official obligations' to one another we seemingly leave no exit. If we do not, we change nothing at all. If we are to accept the notion of the family as generating associative obligations, we must, I believe also accept its consequences. Just as Dworkin has argued that the obligations of officials in political communities are derivative from the obligations owed by citizens to one another, that officials are the agents of the community in discharging that responsibility, so to we must accept that, at the very least, adult family members have similar obligations, that no latitude for self-preference remains, irrespective of whether this requirement radically diminishes our area of personal moral sovereignty.¹⁰² What follows from this when we come to consider the responsibilities of political officials towards family members? It must, I believe, follow that, in resolving matrimonial disputes political authorities have an obligation to place family members in the positions which they would have occupied had their own responsibilities to one another been fully met in this regard. Further we must conclude is that political officials, owing as they do a duty of equal concern to all the members of the community, have an obligation to act at the behest of those who claim that their rights have been denied and to intervene where it appears that the rights of those who cannot advance claims on their own behalf are prejudiced. Perhaps, and this will be argued later, such officials may also be thought to have an obligation to implement conditions which foster and encourage equality within the family, ensure, so far as possible that adult family members are equally placed to honour their obligations in this regard.

It is time to return to the main thread of the argument we have been developing, one concerning the characteristics which a family must possess if it is to constitute a true community. Once we have incorporated both the background conception of equality of resources and the notion of a moral ledger into our ideal theory account of family as a social practice, we must confront a further threshold question, one encountered in a slightly different form earlier. Have we, in relying upon the language of opportunity costs and appropriating the concept of a moral ledger, begun a slow and almost imperceptible slide from a fluid and open ended discussion of associative obligations into a concrete and specific marriage contract? Is the slide into contract characteristic of any attempt to give concrete form and shape to the

102 *Ibid.*

ideal of an egalitarian social practice, at least within this form of discourse? Here we find ourselves calculating costs and benefits, insisting that Bob evaluate the social setting he desires in order to pursue his chosen way of life in terms of the costs it specifically imposes upon Carol and Delly, and perhaps that Carol as well bears some responsibility, that she ought not simply defer when their interests conflict, that she is both entitled and obliged to advance claims to further her own interests. In relying upon the concept of a moral ledger, we are relying upon the background idea of negotiation between individuals with a continuing and self-conscious relationship, individuals who, at the point at which conflict arises, have approximately equal resources.¹⁰³ In seeking to argue that concepts such as true opportunity costs and a moral ledger are relevant to a discrete and local social practice such as family, have I sought to make the obligations implicit in marriage seem '*more contractual and deliberative*' and less an '*open question*'?¹⁰⁴ Yes, undeniably. In any wholly open ended and fluid position, that individual less willing to claim and defend rights is likely to lose ground. (We ought not forget that very often that particular reluctance is itself predicated upon those felt moral constraints which earlier were characterized as special features of personality. I am tempted to say, despite its impropriety in a thesis, that that is precisely how, historically, women have been 'screwed'.) On the other hand, perhaps such negotiations between spouses ought to be described not as seeking '*just to keep explicit agreements hammered out at arm's length but to approach each issue ... in a manner reflecting special concern*'.¹⁰⁵ If adult family members in fact occupy a position analogous to that of political officials, if they are morally obliged to approach the issues which arise in their common life in a manner which leaves no latitude for self-preference, they are simply honouring such obligations, attempting to work out the problems which inevitably arise in a manner reflecting equal concern and respect. If the arguments put thus far have been at all persuasive, we have come a very long way with our account of family as a social practice. Our journey has supplied at least the rudiments of a further postinterpretive requirement for our account of family and the associative obligations inherent in our practices of family.

Now it is time to return to that account, and ascertain both the degree to which our actual practices of family can be reconciled with the theoretical account we have been developing and also consider the implications of our full account for family law. I have argued, or attempted to argue that any plausible egalitarian account of family as a social practice, within Dworkin's framework, must, as part of the more general requirement of equal concern and respect, acknowledge equality of resources, at least with respect to adult individuals. That is, the true opportunity cost of the resources and the social requirements some family

103 I, in fact, chose the example given to suggest that any initial inequality between Bob and Carol was a consequence of decisions concerning work, leisure and consumption. Were they not relatively equal at the outset (which is of course likely in communities such as our own) matters would have been complicated still further.

104 Dworkin, *Law's Empire*, *loc. cit.*, 198.

105 *Ibid.*, 200.

members have available to pursue their own ends and ambitions must be tested by asking how important they are to others. While it is somewhat more difficult to extend this argument to children, I believe that any plausible interpretation with respect to children must argue that their parents stand in the place of political officials with respect to decisions concerning their welfare, that they must show impartiality among them, treat them as equals in the allocation of opportunities and resources within the family.¹⁰⁶ This might mean, for example, that a family would not be entitled to devote more resources to the education of sons than of daughters simply because of beliefs concerning appropriate education and future roles, because any such decision would fail to treat them with equal respect. Differences might of course be justified on other grounds, for example, a handicapped child might require *more* resources than a normal sibling if he or she were to be treated so far as possible as an equal. It might also mean that where, as in Dworkin's patriarchal family, the parents sincerely believed that the conduct of daughters must be more strictly constrained than that of sons, their daughters would, at the very minimum, be entitled to, for example, enhanced educational provision designed to encourage enough intellectual independence to compensate for physical constraints.¹⁰⁷ To the account already offered of the potential consequences of rigorously applying Dworkin's account of associative obligations to the family, and making that account the basis of our political and legal practice with respect to the family we now add, upon a relatively secure foundation, the idea that equality of resources is as relevant within the family as it is within the wider political community. What might this mean in practice?

In the most obvious case, that of dissolution of marriage, a number of reasonably clear principles emerge. All property decisions, and I include the questions of spousal support and child support in that general category, must be made upon the basis established in equality of resources, that is, taking the history of the marriage as a whole, we must seek to allocate resources between the parties as they would have been allocated had the parties made their decisions in respect of the plans and projects they pursued and the social requirements they believed essential to pursue their way of life upon the basis of the true costs imposed by these decisions upon others. With respect to children, the matter is, I might add, far simpler. The appropriate criteria is to place them as nearly as is possible in the economic position they would have been in had the family endured - including where appropriate provision for support through further education or university. Again, the issue of custody ought to turn upon the question of which parent would be more likely to honour fundamental associative obligations with respect to the children. In the hypothetical noted earlier, clearly Carol would be entitled to be placed in the position she would have occupied had the obligations of family life been shared as equality demands.

106 This requirement is similar to, but perhaps more open ended and less restrictive than that required by Rawls' principle of paternalism.

107 That requirement would, in practice, effectively nullify the restrictions imposed.

Yet, in other circumstances, it is not altogether clear that a straightforward accounting on the basis of true opportunity costs will yield an egalitarian outcome. Consider, for example, a wholly traditional couple, let us call them Emile and Sophie¹⁰⁸, who seek to divorce after twenty years of marriage and four children, three of whom are still in school. While Sophie, who came from a patriarchal family very like that described by Dworkin, worked briefly before her marriage as a typist, she has not at any time since worked outside the home nor has she wished to. Emile, on the other hand, began as a carpenter and now owns and manages a small construction firm. After many disputes over the education of their three youngest children, Sophie wishing her children to have the opportunities which she never had and go on to university, Emile begins an affair with his secretary and subsequently leaves home by mutual agreement. A case such as this presents a wholly different set of problems. First, Sophie has never desired to be anything other than a wife and mother. While it may be that what might be characterized as her general lack of ambition or wider horizons were a consequence of her own upbringing, she and Emile have, throughout their married lives, conducted their relationship upon the basis that she would assume full responsibility for domestic labour and parenting and he would fulfil the role of breadwinner. If one assumes that, when they were married, they were relatively equal, it may be thought that her lack of resources twenty years on is wholly a consequence of her preferences in respect of work, leisure and consumption. Similarly, the fact that Emile has, through his own energies and efforts, been able to attain a reasonable degree of bank account wealth, might also be thought to be a consequence of his preferences. After all, as Dworkin notes, he is entitled to choose a life *'in which sacrifices are constantly made and discipline steadily imposed for the sake of financial success and the further resources it brings.'*¹⁰⁹ Here, moreover, it would appear that Sophie endorsed his decision fully, that their common life style was freely assented to by both and formed the basis of their relationship for as long as it subsisted.

Given this set of circumstances, the language of true opportunity costs seems less helpful. While, on one level, Emile seems not to have paid the 'true cost' of the life he chose to lead, on another it might also seem that Sophie ought in fact be required to pay the 'true cost' of the life she has chosen to lead, given that *'equality of resources offers no . . . reason for correcting for the contingencies that determine how expensive or frustrating someone's preferences turn out to be.'*¹¹⁰ If she has gambled and lost, the outcome is surely a matter of option luck, a *'deliberate and calculated gamble'*¹¹¹ which she might have foreseen and protected herself against, for example by maintaining and developing those talents which might have enabled her to secure additional resources. We cannot, for example, suggest that with regard to her choice

108 See Ch. 8.

109 Dworkin, 'Equality of Resources', *loc. cit.*, 313.

110 *Ibid.*, 288.

111 *Ibid.*, 293.

to remain a homemaker, Emile has failed to demonstrate equal respect. He has, in fact respected her ends as she defined them. Can we say that he has nonetheless failed to show her equal concern? Strictly in terms of equality of resources, I think not. He has, for twenty years, provided for her and for their children to the best of his capacity and their understandings were fully mutual and shared in this respect. He has, in this respect, made sacrifices to ensure her well being and that of their children, just as she has made sacrifices by limiting household expenditure or consumption to ensure that the resources needed if long term goals were to be attained remained available. If their sacrifices were different, they were fully reciprocal. Does this rule out calculations based upon opportunity costs? The problem is this. Dworkin's account of a moral ledger is designed to measure the relative importance of conflicting activities to the individuals concerned through a market simulation test. Here our problem is slightly different. Throughout their marriage no conflict was perceived. Both Emile and Sophie pursued the activities they preferred. Given that conflict has now arisen, not over the lifestyles they each chose, nor over the impact of those choices upon individual access to resources or the opportunity costs of those choices, but over matters seemingly unrelated to any imbalances in a moral ledger, is it proper and legitimate to argue that any appropriate resolution of their affairs must look at the actual opportunity costs their mutually chosen lifestyle imposed irrespective of their actual preferences?

In this context, the contractual backdrop we rejected as inconsistent with Dworkin's conception of associative obligations might have proved useful. Had Sophie, for example, had the foresight to bargain for a fair market price for her services as wife and mother, she might have protected herself against just such an eventuality, ensured herself against the risks inherent in the life she chose. Dworkin's account, however, ruled out such an argument. Hence, we have no choice but to return to our more general conception of associative obligations and attempt to ascertain if it provides assistance. Surely, we might argue, the requirement of equal concern goes also to the question of other aspects of their relationship. Even leaving aside the question of sexual fidelity and the role of mutual fidelity in their relationship, surely, given the agreed basis for their relationship, equal respect might be thought to demand that he take into account in what might be termed her *reliance* interest, the idea that he was not entitled to rewrite the conditions of their relationship halfway through, given that their mutually agreed course of conduct suggests it must have been deemed permanent. Does pursuing this argument suggest as well that in circumstances such as these dissolution ought to be prohibited? Dworkin does, after all, emphasize that if the appropriate conditions are met '*people have the obligations of a true community whether or not they want them.*'¹¹² Or perhaps, does it suggest that, given that continuing the relationship between them has become untenable, and he must assume some responsibility for that circumstance, she is entitled upon the basis of our more general argument to be restored to the overall

112 *Ibid.*, 201.

position she would have occupied had the obligations between them been honoured, that the agreed financial basis of their relationship ought to be maintained?

The children present a further problem, and one which demands that we again draw upon the resources developed in our ideal theory justification for the institution of family. What are Emile's obligations in respect of their children? Quite obviously, on the basis of the arguments deployed in the last paragraph, his financial obligations continue. Two questions which are immediately relevant are the question of custody, given that the children can no longer live with both parents, and the question of the duration of the support obligation. Does Dworkin's account offer the conceptual resources needed to resolve this further issue? On the account I have developed thus far, the question of custody ought to turn solely upon the basis of the entitlement of the children to equal concern and respect. That is, that parent ought to be primarily responsible for their welfare who will most nearly treat them with equal concern and respect. Given that family relationships have been marked by conflict over educational provision for them, and given that equal respect demands that they be given that education which will most nearly enable them to develop their capabilities and realize and pursue ends of their own, it would appear that Sophie ought to retain custody. For the same reasons, it would appear that Emile ought to be required to make financial provision for the children and for their education until they have completed their schooling, through university should they so desire. Emile's attitude cannot be fully reconciled with equal respect, while Sophie's offers the promise of reconciliation.

Yet it may also be that this seems too easy, that Emile's voice has not been heard. Surely Emile might argue that the resolution suggested above utterly defeats the fundamental premise upon which equality of resources is grounded, that '*if people . . . choose different lives it is unfair to redistribute halfway through those lives*'¹¹³ and that this applies within the family as elsewhere. After all, he might argue, surely he cannot be held wholly responsible for the fact that he and Sophie chose different lives, and that effectively the reason she lacks resources now is because she consumed much expensive leisure earlier. He might argue further that the kind of redistribution suggested denies him any choices whatever. His freedom has been wholly eradicated. If he is expected to provide the resources to maintain her at the level which would have obtained had their marriage continued, not only are we ignoring the fact that they chose different lives, with different inherent risks and rewards, we are making that determination in a way which disrespects his right to equal concern. We are disadvantaging him solely upon the basis that we disapprove of his personal moral standards, of his decision to leave a relationship which was no longer meaningful and enter one which offered the promise of being so. Not only is this nothing more or less than prejudice masquerading as justice, what we have suggested is a fair or egalitarian resolution would, if implemented, effectively enslave him for the rest of his life. Because he will, merely to survive, be required to work for the rest of his

113 Dworkin, 'Equality of Resources', *loc. cit.*, 310.

life for little or no reward, he is enslaved in precisely the same sense Dworkin argues that excessively high rates of income protection insurance would enslave. '*He must now work at close to his top earning capacity . . . to break even. He will be a slave to his maximum earning power.*'¹¹⁴ These are, undeniably, powerful arguments, and they lead us inevitably to further questions, questions which are even more fundamental than those posed earlier.

In fact, we are drawn back to what I earlier termed a *baseline constraint*, the idea that family members ought to make their decisions against the background constraints provided by the associative obligations inherent in our ideal theory account of family. Ought the state enforce that baseline constraint, is it in the position of the auctioneer in Dworkin alludes to in 'The Place of Liberty' who is obliged to put certain baseline constraints in place prior to the auction to ensure that the results of the auction were not distorted by such factors as prejudice or constraints which could only be justified on the grounds of personal morality? Dworkin alludes to the possibility of the betrayal of such obligations only once, referring to one who has grown weary of or is embarrassed by the obligations of friendship, and notes simply that at that point it is impossible to reject those obligations without betrayal.¹¹⁵ Undeniably that is true, but most normal individuals have, at some time in their lives, been betrayed by those they deemed friends, and no one, I think, would suggest that political intervention was appropriate. Partners, of course, simply dissolve their partnership, and their affairs are settled according to the terms of the partnership deed or in terms of the parole agreement upon the basis of which they have conducted their relationship. Because partnership seems to me to be grounded in contract, whatever the other obligations involved, a more or less objective basis exists for decision making, and very often, in real terms, they can be restored to an approximate position of equality.¹¹⁶ Marriage and family relationships are more problematical. They are fundamentally private, in a way partnership is not, and at the same time more significant than even the most intimate friendship. In a sense, the state is caught firmly between Scylla and Charybdis, damned if it does intervene and damned if it doesn't. Intervene it must, but upon what basis? Ought it, as I suggested earlier, intervene upon the basis of the obligations which were recognized by the parties themselves unless those could not be reconciled with our ideal theory account of family in which case the latter should prevail? Here, clearly, Emile undertook to support Sophie for her life, and she undertook to accept full responsibility for maintaining a home for him and for their children. What course of action is appropriate where, for example, the marriage is at an end because one individual betrayed an obligation

114 *Ibid.*, 320.

115 Dworkin, *Law's Empire*, *loc. cit.*, 198.

116 I should add that I question the coherence of applying the term 'associative obligations' to obligations generated by practices as wholly distinct, both in formation and character, as families, friendships, partnerships, companies, and political communities, not to mention the other potential candidates, ranging from neighbourhoods to local communities.

the other believed fundamental? Does it matter, for example, that Emile no longer perceives his relationship with Sophie as imposing any authentic obligations? The problem is this. If the state enforces the obligations upon which their relationship appears to have been based, supplemented so far as is necessary by our background justification for the practice of family, it will effectively enslave Emile in the special sense discussed above. If it does not, it has utterly failed to show Sophie equal concern. (In a situation where neither wishes to continue the relationship, it surely cannot insist that the relationship between them continue.) The last twenty years in practical terms sound in profound economic consequences, in actual opportunity costs, and it is impossible to restore her to the position she occupied prior to her marriage, in part because, in terms of the options realistically open to her, she is no longer the same person.¹¹⁷

Both the potential permutations of relationships which are recognizably family relationships and the difficulties in a fully coherent resolution are almost limitless in contemporary society. If, as Dworkin's account of associative obligations seems to compel, we are to recognize and enforce the actual obligations involved, it becomes necessary at some point to spell them out, make them concrete, even contractual. Yet this conflicts with Dworkin's emphasis upon fluid and open-ended reciprocities, upon *disagreement within the family as to the actual obligations entailed*. When we attempt to incorporate equality of resources, as is essential if women are to be shown equal concern, we are confronted by further problems. To function adequately in this context, equality of resources seemingly pushes us almost inexorably towards a contractual analysis, at least with respect to the economic obligations of family, and would undoubtedly function most effectively if these obligations were spelled out in advance. (As we saw in our account of the two-career family, it might also be essential to spell out precisely the way in which the responsibilities of family life were to be shared.) Doing this, however, sits uneasily with Dworkin's overall account of associative obligations, indeed, is wholly denied by some aspects of it. Further, and perhaps most seriously, as the account of Emile and Sophie emphasized, in the real world we are regularly confronted by conflicts which cannot be resolved in a manner consistent with integrity, let alone justice. The case of Emile and Sophie suggests that political officials might be *unable* to resolve such disputes in a way which manifested equal concern for the parties involved, and this, of course, raises further and profoundly significant questions concerning the responsibilities of government.

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Dworkin does note that '*we may . . . have special reasons for forbidding certain forms of gambles [for example] paternalistic reasons for limiting how much any individual may risk.*' 'Equality of Resources', *loc. cit.*, 295. Perhaps, in this context, given the agreed basis upon which they conducted their relationship, they ought to have been required to take out 'marriage insurance' at the outset, to ensure that funds would be available, if circumstances changed, to provide full compensation. Given current divorce rates, such would likely be prohibitively expensive. Or, perhaps, given that Sophie has, in effect, rejected her former life, might it be that she is entitled to a '*fresh stock of resources*'? *Ibid.*, 334.

In this chapter I have argued that no coherent justification exists for our cultural failure to apply egalitarian principles to family life. When we looked at Rawls' theory we recognized that the circumstances of justice did, in fact, apply within families as in political communities more generally. Similarly, when we examined Dworkin's account of associative obligations and sought, using his method, to construct an ideal theory account of marriage and family in order to provide a foundation for family law and the resolution of disputes which arise within families, we recognized the absolute necessity of incorporating Dworkin's background theory of political equality, equality of resources. We recognized as well that, in the real world, even these radical extensions could not, in all cases, provide a resolution which met the demands of justice, leaving open the possibility that a government truly dedicated to justice might find it necessary to go further. Our account thus far calls into serious question the insistence of both Rawls and Dworkin that their accounts represent '*a principle of political organization that is required by justice, not a way of life for individuals*'.¹¹⁸ If no rational reason exists to exempt family life from the demands of justice, it follows that no rational basis exists for the insistence of theorists such as Rawls and Dworkin that their theories are political merely and their account of the individual a political account. It follows as well that the distinction between private lives and public persons may be impossible to sustain. Given this, we now turn to examine the accounts of classic social contract theorists in some detail, and particularly to examine the way in which their exclusion of women (and children) from the social contract enabled them to sustain the public/private distinction, secure a realm of private freedom, and, most importantly, advance an account of the individual which implicitly denied moral standing to ordinary human relationships.

SOCIAL CONTRACT THEORY AND THE FAMILY

In the last chapter we examined the resources contemporary egalitarian theories make available to characterize the marital relationship. So doing, we recognized that, for both Rawls and Dworkin, our attempt to construct an ideal egalitarian account of marriage, and ultimately family relationships, moved us inexorably towards an account of marriage and family life in which individual obligations were given concrete form and shape and towards state enforcement of the terms of those relationships where they were sufficiently just to impose moral obligations. We have moved some distance towards an account which suggests that no justification exists for treating the family as somehow outside the requirements of civil society, indeed, the fact that no adequate resolution existed for certain common problems suggested that the state might have an obligation to develop programs designed to encourage equality in family relationships. Having argued that family relationships are not, in fact, fundamentally different in character from political relationships, that the same standards ought to apply, we have begun to move towards an account suggesting that political officials have an obligation to ensure that justice obtains within family relationships in the same way and to the same extent as elsewhere in civil society. This, of course, was the precise problem that the structure of classic social contract theory was designed to avert. In this and succeeding chapters, we will return to early social contract theory and examine its treatment of marriage and family life and attempt to understand the perceptions and ideals which acted to compel the accounts given and finally the degree to which these same perceptions and ideals remain relevant to contemporary theories.

The earliest liberal theories circumvented any need to consider the political implications of the relationship between men and women and that between parents and children by proclaiming that, from a public perspective, the interests of all family members were vested in the male head of the household and only he possessed legal status as a public person. Such theories appear to have simply accepted and justified the existing legal position. The father's authority within the household was beyond question, and the manner of its exercise, except in cases of pathological violence, immune to interference from the agencies of the state. It was without doubt the most significant and most sweeping of the private liberties secured by the rule of law. Not only was a man's home his castle, within it he was legally entitled to rule as monarch.

Equally the apparent failure of classic liberal theorists to question traditional ways of ordering family relationships must be compared with their ruthless and radical questioning of prevailing assumptions concerning the nature and origins of political society and the source of the legitimacy of state coercion. Their assault upon the legitimacy of patriarchal political authority must be contrasted with their thoroughgoing, even enthusiastic, affirmation of men's

authority over their wives. Why did theorists such as Hobbes and Locke in particular¹, assume, given a state of nature in which men and women were approximately equal, that only men would become parties to the social contract and that women would uniformly 'consent' to male dominion? What sort of consent was involved and how was this consent obtained? Why, indeed, would women consent to what, at least for Hobbes, amounted to wholly arbitrary rule? To understand what is involved, two very different stories must be explored and reconciled, one suggesting the a-rationality of passion and affect and the danger posed by passion to the dispassionate and rational civic fraternity, and the other suggesting conquest by force which was subsequently 'legitimated' by consent and enforced by the rule of law.

HOBBS AND THE MARRIAGE CONTRACT

Hobbes, characteristically, delineates the story of force most clearly, although, as we shall see subsequently, even in his account ambiguities remain. In the state of nature, it mattered not at all how dominion was acquired, whether by consent or by force.² In either case the critical factor was contract. If dominion was by consent, that consent was binding, and in the state of nature it was obligatory even if it originated from fear.³ If dominion was by force, at the point at which a captive was granted bodily liberty he or she might be taken to have agreed to accept the master's rule and not do violence unto it. If men succeeded in obtaining absolute dominion over women prior to the foundation of civil society, their authority continued undiminished unless or until it was curtailed by law. As Hobbes notes

*For the Father, and Master being before the Institution of Common-wealth, absolute Sovereigns in their own Families, they lost afterward no more of their Authority, than the Law of the Commonwealth taketh from them.*⁴

Now what Hobbes means is that certain status relationships, those between husbands and wives, between fathers and children, survive the social contract, indeed can be enforced by law if necessary. Such relationships, when entered by contract, establish voluntary as opposed to hereditary bonds of domination and subordination. The social contract, a public contract between equals, was between sovereign and independent individuals, representatives of the families over which they had *previously* obtained dominion. The institution of commonwealth need not touch the internal ordering of these relationships, save only in that all within the household, including its head, must obey the laws which govern all subjects. (Here also we see the absolute necessity for an initial contract, as that between husband and wife and between

1 Rousseau's account is very different and the arguments put by him supply a detailed rationale for the exclusion of women from civil society and an implicit account of the reasons women would find it rational to submit to male authority. See Ch. 8.

2 Hobbes, *loc. cit.*, 255-56.

3 *Ibid.*, 198.

4 *Ibid.*, 285.

parents and children. Had wives, for example, not once been 'individuals' who by their consent enabled their husbands to represent them they must, on this account, have remained outside the rule of law, remained a force capable of undermining the social contract.) Their status, their voluntary subjection, both eradicated their natural equality and ensured that, despite standing outside the social contract, they were nonetheless subject to the laws of the state. The source or basis of male dominion over either individual women or women in general was irrelevant. Howsoever acquired, whether by consent, tacit or actual, or by force and, thereafter, promised obedience in exchange for limited freedom, it preceded the formation of commonwealths. A man's wife and children were among those *possessions* the social contract was intended to secure. Citizens must be compelled to act justly, so that no man is deprived of what is his own, his life and limbs, his property in his wife and children, and his other goods, for it is these that the commonwealth is instituted to protect.⁵

LOCKE AND THE MARRIAGE CONTRACT

Locke tells a very different story, one which, on its face, emphasizes emotional and biological ties. According to Locke, the 'natural' bonds of necessity, convenience and inclination led men and women to form private societies. The first society was that formed by *compact* between man and wife, its purpose or aim being the continuation of the species. Unlike Hobbes, Locke (perhaps carelessly) attributes the subjection of the wife to the 'natural fact' that the man is the abler and stronger.⁶ This 'natural fact', of course, was wholly inadequate to explain the subordination of women, and Locke must have recognized its logical inadequacy. If natural differences in ability and strength are sufficient to legitimate subordination, it follows logically that stronger and abler men ought to be entitled to rule over their weaker fellows, rendering the 'social contract' irrelevant, indeed both unnecessary and impossible. For this reason it is significant that Locke was at great pains to distinguish the dominion involved in household relations, a dominion which was inherently limited to the purposes for which it was required and which *granted no legislative power* from the dominion involved in political society which was marked by legislative power extending to power over life and death. Locke emphasizes that the authority of the husband is merely conjugal, being

*the Power that every Husband hath to order the things of private Concernment in his Family, as Proprietor of the Goods and Land there, and to have his Will take place before that of his wife in all things of their common Concernment; but not a Political Power of Life and Death over her, much less over any body else.*⁷

⁵ *Ibid.*, 382-83. As Hobbes notes 'of things held in propriety, those that are dearest to a man are his own life & limbs; and in the next degree, . . . those that concern conjugall affection; and after them riches and means of living.'

⁶ Locke, *loc. cit.*, 362-365.

⁷ *Ibid.*, 210. Even while Locke denies the equation of political authority and conjugal authority, the parallels between the two are striking. Even as the authority of the husband is limited to matters of common concern, the authority of the state is limited

(as abstract individuals in the state of nature) were approximately equal, men and wives were not. Women contracted to become wives, and doing so forswore equality, and as wives, agreed to remain outside the relations of civil society. Whether they had any actual, as opposed to formal, choice was irrelevant, as both Locke¹⁰ and Hobbes¹¹ made clear.

THE SOCIAL CONTRACT AND MALE BONDING

The social contract was envisioned as an agreement between those who were capable of acting as public persons, might be said to possess full legal capacity. The absence of women from the formation of civil society on the formal level, however, must not be taken to signify either universalization or inattention on the part of early theorists. Rather, there was no reason for women to be present on the formal level precisely because of their symbolic role, their location within the family as wives. When we look at these early theories, then, we must ask again whether this simply represented unquestioning acceptance of the status quo, of the legal status of married women as *femme covert*, or whether something very different and far more significant is operating beneath the surface of the written text. (The intersection of force and passion, the oscillation between these images may be significant.) The social contract symbolizes an agreement, not between individuals, but between families, each represented by its head, a point which is explicitly made by Hobbes. If, on the formal level, women were wholly absent, on the symbolic level that was because, prior to the advent of the social contract, they had ceded their independent identity and equality to their husbands. Cooperative relationships within families presented no problem because women had ceded their natural liberty to their husbands who were, by contract, entitled to maintain their authority by any means appropriate to that purpose.¹² Cooperative relationships between men, indeed between families, on the other hand, presented serious problems given the belief among such early theorists that without law and without the coercive authority of the state to enforce it, men could not be relied upon to keep their promises. In political terms, the social

10 Locke, *loc. cit.*, 325. In discussing slavery, Locke notes that while no man can contract to become a slave, because true slavery gives the master power over life and death, a man may nonetheless enter a contract for lifelong servitude, reserving only to himself his power over his own life. The parallel between this sort of 'slave' contract and the marriage contract is inescapable given that Locke clearly differentiates the power of the husband over his wife from political power by virtue of the fact that it does not extend to life and death. See pp. 365-66. How consent was obtained, whether to marriage or to servitude for life was irrelevant.

11 Hobbes, *loc. cit.*, 255-256.

12 Likewise, masculine or paternal authority might be thought to ensure obedience. Such liberty as women enjoyed within marriage depended upon their obedience and compliance, and should they violate the terms of the agreement, their liberty might be removed. Cf. Hobbes' discussion of slavery and the obedience due a master by a slave. Implicit in this is the master's right to retaliate should the slave disobey. *Ibid.*, 198-200. Fear again would suffice to compel her to keep her bargain, at least up to a point. Again, contemporary accounts of violent relationships support this. In many cases, such relationships endure for years, despite escalating violence. Fear, a perverse form of love, and profound dependence are enough.

contract was an attempt to explain how separate and independent families, each represented by its head and jealous to guard its interests against other families and to preserve its property might find it in their interests unite and form a state.¹³ Entry into the social contract and submission to the rule of law formed the substratum of a theoretical account of male bonding¹⁴, of the conditions necessary to ensure that men would find it to their advantage as heads of households to engage in cooperative activities and to submit, together with others like themselves, to the rule of law.

Yet, despite the ample justifications for the account given above in the structure of the texts of theorists such as Hobbes and Locke, a very different account is also available. Family relationships and political relationships were seen in very different terms.¹⁵ Family relationships lay beneath or beyond explanation, had seemingly always existed almost unchanged. The emotional bonds between husband and wife, between mother and child, required neither explanation nor justification, although, crucially, the bond between father and child was also accounted for very differently, as sustained by the desire of the child to secure his inheritance.¹⁶ The symbolic proclamation of equality and fraternity emphasized the rejection of feudal hierarchies and assigned status and affirmed the independence and equality of adult males, their capacity to act as representatives. All relationships depended upon contracts between equals. Early social contract theories developed their accounts of civil society against the background of an imagined state of nature. In the state of nature, all individuals, male and female, were approximately equal. This approximate equality is critical to the structure of such accounts. It applied whether the state of nature was the brutal 'state of war' of Hobbes, the comparatively peaceful but competitive and acquisitive world of Locke, or the idyllic and pre-human natural freedom of Rousseau. If bonds among individuals in the state of nature existed at all, these were somehow less moral bonds than natural relationships,

13 For a parallel account, see Okin, *Women in Western Political Thought*, loc. cit., 197-201. Rousseau made the connection between the role as head of the family and the role of citizen explicit. See Rousseau, *Emile*, loc. cit., 160.

14 The critical problem was to offer an account of how independent individuals, with no natural foundation for cooperative relationships, might find it reasonable to agree. While sexual attraction and procreation provided a 'natural' basis for relationships between men and women, no comparable foundation existed for relationships between men. Given the total absence of any biological (or moral) foundation for male bonding, a political foundation must be established.

15 Cf. Locke's distinction between political authority and paternal or spousal authority. A Queen might exercise political authority over her husband as over any other subject, but he might, apparently, exercise conjugal authority over her in all those matters which concerned their relationship as husband and wife unless this had been excluded by contract. *Locke*, loc. cit., 209-210.

16 Locke explicitly notes that a significant element in the power and authority of the father is his right to bestow his estate upon that child who pleases him best. *Locke*, loc. cit., 357. See also, Rousseau, *The Essential Rousseau*, loc. cit., 190 where he describes the father's property as the tie which keeps his children 'under his dominion'.

the sexual relationship between man and woman, the nurturing and protective bonds between mother and child, and these were given a 'natural' or quasi-'natural' foundation.¹⁷ The philosophical problem was to offer an account of civil society which showed how men might realize peaceful and productive relationships among themselves, given the absence of any binding ties such as affection or sexual need. While sexuality bound man to woman and woman to man, at least for brief periods, while maternal instinct bound mother to child, *no natural bonds of any kind existed among men*. Under feudal hierarchies, hereditary bonds of obligation and status had ordered society in complex hierarchical structures, had ordered social relationships among men. These political and socially constructed relationships were being swept aside, were the object of attack by social contract theorists who argued no natural, hereditary right to political dominion existed.¹⁸ For this reason, a political account was required, one which explained how, in the absence of emotional bonds and divinely constituted authority, peaceful and productive political relationships might be created among men who perceived themselves as equals.

Family relationships, relationships among men and women, and, apparently, relationships among women themselves, posed no comparable problem. The bonds between mother and child were mediated on the one hand by the dependence and helplessness of the child and on the other by the natural obligation of the mother to protect the child until it had attained the competence to do so for itself. Similarly, where the father had or was granted authority over the child, the relationship remained natural, did not at the outset require legal ratification and enforcement. Although early social contract theorists with the somewhat ambiguous exception of Rousseau accounted for marriage in contractual terms, contract seems an afterthought which gave public ratification to a natural, pre-civil relationship, and enabled the state, where necessary, to back a natural relationship with the authority of law. Locke, unlike Hobbes, argued explicitly that the authority of parent over child, of husband over wife was different in character from political authority. Only political authority entitled its holder to enact laws which might be enforced by the power of the state.¹⁹ *It follows that the clearest distinction between the family and the state lay in the fact that within the family there was authority but no law, whereas within the state authority and the submission of all to the rule of law were inseparable.* In simplest form then, peaceful and productive relationships among

¹⁷ The use of the terms 'nature' and 'natural' is, of course, profoundly ambiguous. Given the schematic account of motivation adopted in varying degrees by all social contract theorists, such terms appear to be redundant and devoid of legitimating capacity. All perhaps that can be said with any degree of certainty is that a natural relationship is one in which concepts of law (and indeed morality) have no role to play. A relationship which is natural is one which does not require the intervention of law to survive.

¹⁸ Locke developed the distinction between paternal authority and political authority most fully. Locke, *loc. cit.*, 169-303.

¹⁹ *Ibid.*, 308.

men depended upon law, relationships between parents and children, between husbands and wives, and between women themselves seemingly did not, at least at the outset. The exercise of state power, through law, demands legitimation; familial authority does not.²⁰ The power of law over the family and family members serves to establish these relationships publicly, to ensure that men's property (acquired by contract) in their wives and children will be recognized and respected by other men.

Why was this thought to be the case? What differentiates the relationship between husbands and wives, between parents and children from relationships among men? The account developed thus far from textual references²¹ comes close to analogizing the marriage contract to a 'slave' contract, grounding family relationships ultimately in something akin to conquest (or rape), giving credence to the accounts of contemporary radical feminists.²² Yet other aspects of Locke and Rousseau²³ present a less violent face. Locke emphasizes '*mutual Support, and Assistance, and a Communion of Interest . . . as necessary . . . to unite their Care and Affection.*'²⁴ Certainly a passage such as this with its emphasis upon mutuality, intimacy and affection seems difficult to reconcile with the contractarian backdrop and its potential for a consent extracted by force or fear. This, in itself, suggests that on a phenomenological level, the contractarian account of marriage, while needed for theoretical coherence or integrity, was at odds with another, very different account. If, for example, as the passage quoted above suggests, the critical characteristics of the marital relationship were mutual support and intimacy, it may have been those precise elements which were unique to family relationships and which finally and irrevocably set them apart from relationships among men. Mutual support and intimacy seem unlikely to emerge from a contractual relationship which might, in the final analysis, have been compelled by the fear of one individual and the threat of force on the part of the other. On this reading, the contractual interpretation of marriage and family relationships could be said to be superimposed upon the intimate for a very particular reason, *that of ensuring that such relationships were acknowledged and honoured by other men.*²⁵ Contract representing reason, rules, and the possibility of invoking impartial authority must be superimposed upon intimacy and affect, if intimacy and affect are to be secure from depredation. Reason must attain ascendancy over passion. (This as well provides a clear

20 While both marriage and the relationship of fathers with their children were ratified by contract, the means by which consent was obtained does not appear to be relevant to the legitimacy of masculine authority.

21 The legitimacy of naked force is clearest in Hobbes, however it is open on Locke's account as well. See n. 2-8, 12, 14 above and the associated text.

22 Eg. A. Dworkin, *loc. cit.*

23 See Ch. 9.

24 Locke, *loc. cit.*, 362.

25 Cf. Hobbes, *loc. cit.*, 383.

argument for masculine authority within the home and within the state. If women were believed to act, not on the basis of rational self-interest, but from emotion, masculine authority was essential if the interests of the family were to be protected. Emotion, intimacy, even love are irrational, do not depend upon a rational assessment of self-interest. They are uncertain, subjective, and arbitrary.)

Lyman, working within the modern context, has argued that the need to account for male bonding through contract, and, therefore, to account for the emergence of civil society as a contractually established bond among men is best understood through examining the role of rules in relationships among men. He argues that relationships among men are characteristically mediated by rules rather than being emotionally warm and intimate, citing the bonds created through sporting activities and games which involve competition mediated by the rules needed to ensure that aggression remains goal directed rather than destructive. Rules, and ultimately law, replace intimacy and emotion as a basis for harmonious cooperation and interaction. Lyman comments:

*Rule-governed aggression is a conduct that is very useful to organizations, in that it mobilizes aggressive energies but binds them to order by rules. The male sense of order is procedural rather than substantive because the male bond is formal (rule governed), rather than personal (based upon intimacy and commitment). Male groups in this sense are shame cultures, not guilt cultures, because the male bond is a group identity that subordinates the individual to the rules, and because social control is imposed through collective judgments about self-control, such as "strength" and "cool". The sense of order within such male groups is based upon the belief that all members are equally dependent upon the rules and that no personal dependence is created within the group. This is not true of the family or of relations with women, both of which are intimate, and, from the guys' point of view, are "out of control" because they are governed by emotion.*²⁶

The parallel with social contract theory is unmistakable. The emphasis upon shared dependence upon rules, and the rejection of all forms of personal dependence represents the classic problematic of social contract theory. In the state of nature, lawlessness and/or passion prevail. Survival either depends upon strength and perpetual watchfulness or entails reliance upon the good will of others. In either case, it is uncertain. If survival depends upon strength, one can survive only as long as one's strength and watchfulness last, and even then one must sleep. If survival depends upon the good will of others, this is also uncertain. On the one hand, if survival depends upon securing and maintaining the good will of those who are stronger, no inherent limits exist. One will do whatever one must to maintain it, and,

26

See P. Lyman, 'The Fraternal Bond as a Joking Relationship: A Case Study of the Role of Sexist Jokes in Male Group Bonding' in M.S. Kimmel (Ed.), *Changing Men: New Directions in Research on Men and Masculinity*, Newbury Park, Sage Publications, 1987, 149-163. The passage quoted above may be found at p. 161. Cf. Locke's emphasis upon the real and ultimate distinction between familial authority and political authority. Family authority confers no legislative power, the essence of political authority is legislative power. Locke, *loc. cit.*, 364-367. One might say that what distinguishes the public and the private is the presence or absence of rules.

inevitably, this constitutes a relationship of profound dependence.²⁷ On the other hand, good will itself is transitory. That which pleases today is likely to be out of favour tomorrow. In either case the individual is dependent upon the essentially arbitrary will of his fellows. If, as early social contract theorists believed, men naturally pursued their own interests and sought to set themselves above their fellows, dependence upon others was profoundly risky. Only if all depended equally upon rules, upon impartial authority, would it be possible to engage in the sorts of exchange transactions which furthered the interests of all. This demanded that the political bond of civil society, the public bond, be constructed in opposition to the emotional, and therefore, unruly or arbitrary, substratum of family life.

Here then was a double edged sword. The family itself must be brought under civil control. The state, or sovereign represented the only legitimate authority, and no lesser form of regulation might usurp its authority. Despite this, because family relationships depended upon emotional bonds and were open ended, bearing little resemblance to the bounded and discrete transactions typical of private law, law must be kept out of the family. Simultaneous realization of these goals depended upon the exclusion of women from civil society and upon recognition that the husband was entitled to exercise dominion over the family itself. *The family as a conceptual entity, as the property of male citizens, might be subjected to rules, thus minimizing the threat to masculine solidarity posed by intimate relationships.* Because family relationships generated emotional bonds, epitomized intimacy and individual commitment, rather than impersonal and formal rule governed relationships, women were perceived ambivalently as both remaining in the state of nature as individuals and becoming subject to the laws of civil society, not as individuals, but through their status as members of families, as wives, daughters or sisters. Either way, women might be excluded from the formal and rule-governed relationships of civil society and their inherent demand for equality.

Lyman's account is provocative against the background of the social and economic changes leading to the development of early social contract theory and suggests an alternative way of viewing its form and shape. The feudal order had broken down and the social obligations governing relationships among men ceased to exist. Traditional ways of maintaining social order were under threat. Against the background of the increasing predominance of waged labour and the polarization of society between rich and poor, the authority of the state seemed both devoid of justification and urgently needed. Men were perceived as rootless and detached from any natural order in a way which had not before been the case. Two interrelated problems had to be solved. First, why would men submit to rules, given that traditional hierarchies and networks of obligation had become irrelevant and there was nothing to replace them? Second, and even more fundamentally, how could such submission be conclusively demonstrated to be equally in the interests of all? The answer was simple. Men submitted to the rule of law, to the social contract, because only in this way could

27

This, of course, also represents the precise problematic of the violent marriage.

they achieve stable relationships among themselves, and secure order without reconstituting the abandoned status relationships of superior and subordinate, relationships which involved personal dependence and inequality. Rule-governed relationships generated wholly by exchange, exchanging something less valued for something more valued, offered the promise of stability and order. Men submitted to rules because it was in their interests to do so. If men were to realize peaceful relationships among themselves, the bonds between them must be socially created and authoritatively enforced. No natural bonds of affection or of compelling need such as that produced by the natural inequality of the child were available as substitutes both because such relationships seemed arbitrary and irrational and because they inevitably involved personal dependence. The conditions of economic life militated against enduring cooperative relationships among men. Men competed to secure the resources necessary for survival, and in a world in which perhaps as much as half the population lived at or below the subsistence level, it seemed clear that men such as these had little reason to honour agreements unless it could be shown to be in their interests to do so. The already desperate have few reasons to honour agreements, and the strong even fewer, at least when dealing with those weaker than themselves. Against the background of a social system in which status was individual, available to be won and easily lost, traditional relationships such as kin and community provided no defense against chaos.²⁸ For theorists such as Hobbes, the state of nature represented a society in which natural order had been destroyed, in which the old ties binding man to man had been dissolved and nothing existed to replace them. Only law, authoritatively enacted and universally and impartially enforced, had the capacity to restore order, harness aggression and self-interest and render them productive.

In the Hobbesian account, because men were incapable of self-control, they could escape the brutality of the state of nature only through their voluntary submission by contract to the Sovereign, Leviathan. Their submission to the rule of law, a submission born of fear, enabled them to escape the uncertainty and brutality which was their natural condition. While Hobbes emphasized the fundamental equality of men and women in the state of nature, women were not to be found among the parties to the social contract, ostensibly because men created commonwealths, not women.²⁹ More subtly and significantly the state of nature might quite reasonably be seen as inherently feminine in the sense that it represented a world without formally structured relationships between equals mediated by rules. Men perceived their own relationships with women, and, most particularly, women's relationships to children as unstructured, fluid, intimate, emotional. Relationships within the family fit this model.

28 For a discussion of the demographic and economic background of social contract theory, see I. Shapiro, *The Evolution of Rights in Liberal Theory*, Cambridge, Cambridge Univ. Press, 1986, 24-29.

29 On the brutality of the state of nature, see Hobbes, *loc. cit.*, 188, on the need for absolute authority to enforce agreements among men see p. 196, on the role of law in securing and sustaining paternal authority and on the natural equality of women see pp. 253-255.

Women were perceived as mothers, as wives, as sisters or daughters, but not as competitors, not as involved in the struggle for survival in the same way as men. Family relationships, unlike other traditional relationships of mutual dependence, had not been swept aside by social and economic change, appeared timeless, and in that respect, natural and a-political. In this respect, women seemed much more closely allied to nature than were men. The primary relationships in which they were involved, given the increasing destruction of their economic role, remained outside the struggle for survival.³⁰ Familial roles represented the core of women's lives, and these roles and the relationships surrounding them, depended upon emotional bonding and intimacy, not rules.

It is revealing that Darwin, little more than a century later, might, in the course of a cost-benefit assessment of the advantages of marriage, cite as a significant benefit the presence in the home of '*an object to be beloved and played with - better than a dog anyhow*' and contrast this with '*spending one's whole life, like a neuter bee, working, working, and nothing after all*'.³¹ In this passage two significant elements are present: the image of an unstructured, fluid, emotional, but none the less proprietary relationship such as one might have with a superior domestic pet, and the inescapable balancing of interests. Women's roles and relationships were perceived as unchanging, rather like the lives of the small dogs common in paintings of the period. In men's lives, on the other hand, a sharp distinction might be made between the fluidity and formlessness of family relationships, and the struggle to compete and to survive characteristic of civil society, a contrast clear in the passage above. For them, the distinction was all important. The enforcement of contractual arrangements, the protection of proprietary rights, protection against arbitrary violence were essential. Without these protections, neither the marketplace nor the home would be secure.

Another factor might be thought to be significant as well, one likewise highlighted by Darwin's musings. The marriage relationship was also perceived as analogous to a proprietary relationship, an image highlighted by the use of the word object, one in which the husband saw himself as obtaining a species of property in his wife's body and securing thereby the legitimacy of his heirs.³² All proprietary relationships required protection by law, a point emphasized by every contract theorist. Hobbes' characterization is unusually sharp and pointed: '*no Propriety, no Dominion, no mine and thine distinct; but only that to be every mans that he can get; and for so long, as he can keep it*'.³³ The emotional bond was different. The desire to

³⁰ I note here the class distinction, the gulf between the social habits and attitudes of the elite and those of the working classes among whom women continued to work as they always had.

³¹ The *Darwin Papers*, Cambridge Univ. Library, cited in Macfarlane, *Marriage and Love in England*, *loc. cit.*, 3-4.

³² Macfarlane, *loc. cit.*, 242-243.

³³ Hobbes, *loc. cit.*, 188.

provide for the secure transmission of property to legitimate heirs represented an important theme in early social contract theory. Hobbes, like Rousseau, recognized fatherhood as a socially constructed relationship as opposed to one which was self-evident and immediate like motherhood. Precisely because fatherhood is not self-evident, but depends upon the wife's willingness to permit sexual access only within marriage, this presented a further problem. Relationships outside of civil society were perceived as arbitrary and unruly, governed by emotion, fraught with danger for that reason. Outside of civil society no reasons existed for men to keep their promises, honour their obligations if they perceived doing so to no longer be in their interests. Quite clearly, given that men and women were equal in the state of nature, and therefore shared a common motivation and psychology, the same applied to women. No reason is immediately apparent why this logic ought not to have applied to the promises inherent in marriage, including the vow of sexual fidelity. Why, then, might it remain permanently in a woman's interests to be faithful? Why, indeed, would she ever consent to her own subjugation in the first place? The first question might be easily answered. Dependence upon a husband for protection and support became the answer. If she could not survive without protection and support for herself and her children, if her relationship with her children could be severed should she depart from her husband, her dependence would guarantee her fidelity. (Such reasoning, paradoxically, depends upon the belief that women would not willingly abandon their children, that for them, at least, natural enduring bonds were possible.) The second, obviously, is more difficult and complex, and, indeed two very different answers were explored above. The first, and most textually obvious answer, lies simply in force and fear, in the threat of rape and the promise of protection in return for compliance. The contractarian accounts given by both Locke and Hobbes emphasize the binding force of obligations acquired by at least some contracts, even in the state of nature, and irrespective of the circumstances under which consent was obtained. Only life itself might be said to be sacrosanct. Secure possession of women and families as property provided a motivating force for the social contract. Only through the social contract could men secure their property in their wives and children against other men. The second, suggested by textual evidence in the work of Locke and Rousseau, lies in the intimacy and fluidity of family relationships. Relationships between men and women in particular were lawless, essentially unruly, irrational, governed by emotion not reason. The sexual or marital contract was superimposed upon the emotional substratum, served not to alter the character of the relationship as such, but to guarantee that it would be respected by other men because it had been entered by contract and could be enforced by law.

Despite the inherent ambiguity, family relationships were thought of both as outside of civil society in the sense of pre-existing it and being independent of it and as fundamental to the structure of civil society and to its purposes, in particular, the lawful transmission of

property to legitimate heirs.³⁴ While dependence might bind woman to man in the short term, more was needed, given that women were equal to men in every respect, and in particular, unless compelled by law, no more likely to honour their promises. In what way, then, might fatherhood be securely established? The answer was the dominion of the husband over his wife (howsoever attained), usually put in terms of his entitlement to rule. Civil society was essential, to enforce the authority of the husband and father within the household should this be necessary and to punish those who violated the husband's proprietary right in his wife. Civil society guaranteed men legally enforceable dominion over women and children. Once family relationships were regulated through agreement among men, the power of the state could be used to protect the rights and obligations granted thereby just as it could be used to enforce the reciprocal rights and obligations of the marketplace. The rules of civil society limited the parameters of conflict among men, whether over women and children or over other forms of property. Within the limits established by rules, men were free to compete among themselves, mobilize aggression for productive ends. Men emerged as citizens, equal and independent members of civil society, while women remained wives, necessarily dependent and no longer equal.

Even in the gentler imagery of Locke, despite the approximate equality of men and women in the state of nature, participation in civil society was reserved for men. For Locke, the social contract had as its primary role the securing of proprietary rights and the facilitation of the transmission of property from father to son. Locke explicitly attributed the obedience of children to their fathers to a tacit compact. Only through continued obedience could children secure their patrimony. The father would naturally transmit the bulk of his property to that child who pleased him best. The natural compact between fathers and children, one born of self-interest and one which tended towards monarchical rule, must be replaced by a social contract among men. This secured *male* independence from the tyranny of patriarchal rule, and replaced it with the formal fraternal equality of men in civil society.³⁵ This line of reasoning is particularly interesting because Locke simultaneously argued that children owed equal obedience to both their father and their mother, both parents being equally responsible for their existence and well being, an argument integral to his attack upon Filmer and his denial of the legitimacy of patriarchal political rule.³⁶ Why, then, did he find it critical to reinforce the bond between father and son with a tacit compact, a compact which might be

³⁴ The latter point was put particularly clearly by Rousseau in one of the notes to 'The Social Contract'. See Rousseau, *The Essential Rousseau*, *loc. cit.*, 123.

³⁵ On the function of civil society, see Locke, *loc. cit.*, 395-396. On the tacit compact or contract between fathers and children and particularly on the way in which the possibility of receiving an inheritance induced children to obey their fathers see pp. 356-361.

³⁶ *Ibid.*, 345-361. It is noteworthy that, at least in the family context, Locke thought obedience could be equally owed to both parents, unlike the ruthlessly consistent Hobbes.

thought, in light of his previous argument, to be redundant, particularly since the mother-child relationship required no such reinforcement? The contractual rider is most coherently accounted for by the fact that the mother-child relationship is self-evident, unimpeachable, while the father-child relationship is socially constructed, relatively easily impeached, and dependent either upon custom or upon law. While men achieved independence and secure ownership of all they possessed as members of civil society, women, not being members but subjects, remained outside. Given these assumptions, children could not be bound to their mothers by a desire to secure future benefits. Women's natural freedom had been ceded to their husbands in exchange for continued support and protection. While Locke acknowledged that the husband's authority over his wife had limits, extended only to matters of common concern, and that in some societies she might have the right to separate from him, so long as the relationship subsisted the family spoke with a single voice, that of the husband. Because marriage and paternity vested the interests of the wife and children in the male head of the household, women and children possessed no publicly acknowledged interests which might conflict with those pursued by the head of the household. In the private marital contract, a contract ultimately ratified by the state, the woman exchanged her independent identity and her right to make certain decisions regarding the disposition of her person and property for her husband's protection and support. Once this had been done, she was hidden from public view, legally identified as a *femme covert*. She ceased to exist as an individual, as an independent right and duty bearing unit visible to civil society.³⁷ The status of wife was incompatible with individuality.

Why was this perceived as necessarily so? After all, within the state of nature, woman, for both Hobbes and Locke, must have been at least potentially equal. Were she not, *she could not contract*. The critical transition was from individual to wife. As individual, woman was at least approximately equal - as wife subject to the will of her husband. Seemingly, this very natural equality necessitated both the treatment of family relationships as a-political or pre-political, and, with the implementation of the order of civil society, dictated her dependence and subordination. It is in their accounts of relationships between men and women that we find the clearest distinction between Hobbes and Locke. While Hobbes acknowledged the presence of love among the passions, and like Rousseau, linked it immediately with jealousy,³⁸ he did not mention love or even affection in his account of family relationships. Rather men's wives and children were mentioned in the same breath as their persons and chattels and were identified as a primary source of conflict among men, men seeking to make themselves masters of other men's goods.

Why women did not seek to make themselves masters of other women and men and of their property is not immediately apparent given Hobbes' schematic account of human

³⁷ *Ibid.*, 364-365.

³⁸ Hobbes, *loc. cit.*, 124.

nature. If his logic is applied ruthlessly and universally, it follows that not only is woman approximately equal in strength and prudence, but in self-interest. Like her mate, she would honour agreements only so long as it remained in her interests to do so; like his, her will was fundamentally arbitrary. She was, in fact, as was her mate, a reasonably unpleasant predatory animal, governed by self-interest, acquisitive and competitive, and unlikely to honour any sort of agreement should it conflict with present interests. As Hobbes emphasized, in the state of nature there could be no valid covenant based upon mutual trust.³⁹ It followed that, without authority backed by law, any domestic liaison between these two was unlikely to be either peaceful or idyllic. There could have been no family life, no marriage contract in the state of nature except a contract entered out of fear, one where a weaker party submits out of fear to a stronger.⁴⁰ Yet, Hobbes also acknowledged the natural inclination of the sexes to one another and of parents to their children, suggested an alternative foundation for such relationships in the passions.⁴¹ Equally clearly, however, no secure relationship in the state of nature might be founded upon the passions alone, nor could mere promises or covenants to perform in the future be binding.

How might this (rather perverse) contractarian dilemma be resolved? On the one hand, Hobbes alludes to natural lust or inclination as the source of family ties in the state of nature.⁴² On the other, given that lust is readily superseded by other inclinations, it is inherently insecure. How then may the unity arising out of the passions be sustained if the only valid contracts in the state of nature were those in which performance was immediately complete or those entered out of fear? The answer, ultimately, was that the bond between husband and wife could not be sustained in the absence of civil society. Relationships between men and women predicated upon natural inclination or mutual lust (love?) required civil society to endure. Only relationships based wholly upon fear or conquest might be valid outside it, and even these would endure only so long as the inequality attained thereby might be enforced.⁴³ It is significant that Hobbes regarded such contracts, even in the state of nature, as valid and binding. Thus, if we imagine a contract between man and wife such that (out of fear) she yielded up all her natural right saving only that which she could not yield, her right to preserve her own life, the bare existence of this covenant was sufficient to disentitle the wife from entry into civil society.⁴⁴

39 *Ibid.*, 196.

40 *Ibid.*, 198.

41 *Ibid.*, 253.

42 *Ibid.*, 187 where Hobbes explicitly suggests that the concord within small families depends upon '*natural lust*'.

43 I note, but do not develop, the possibility of an equation of sex and violence.

44 Hobbes, *loc. cit.*, 229. Hobbes notes that those who covenant must be understood to have no prior obligations repugnant to the civil contract. If, prior to the social

The perverse alternation between natural inclination or passion and contractually orchestrated subjugation makes perfect sense on Hobbes' account of human nature.⁴⁵ Indeed, it may have appeared to Hobbes that natural inclination, in the state of nature, required subjection to ensure that it was not too readily dissipated. The possibility of law within the family conflicted profoundly with the perceived nature of family life, its emotional, unstructured, fluid character. Likewise, the natural bonds between mother and child seemed peculiarly unsuited to legal rules, dictated as such bonds were believed to be by instinct. The central problem was the relationship between husband and wife. If natural equality were to be translated into civil equality, if relationships of dependence within the household were to be eradicated by substituting equal dependence upon rules the household would necessarily be assimilated to the other institutions of civil society, become as competitive, as acquisitive, as potentially fractious as were they. Private contract would prevail between husband and wife who would bargain as equals. Conflict within the family might well be thought to be more total and less resolvable, in that a political or democratic solution was out of the question, leaving only the marketplace. The only alternatives to the civil eradication of her existence were two very different visions - either two animals locked in combat, or two rational market actors dealing at arm's length.

For Locke, reconciliation of two apparently disparate accounts, that generated by contract and that which apparently followed from his account of the family, may be attained by tracing a number of critical assumptions. For Locke, man's natural liberty and his political liberty were identical in structure. Liberty consisted solely in not being subject to the arbitrary will of any other, *save only by his own consent*, and even by consent he was incapable of giving another power which extended to his life itself.⁴⁶ For Locke, also, even in the state of nature, consent was, in fact, morally binding or obligatory. What was lacking in the state of nature was public settled law clear even to the most self-interested, an impartial judge, and the power to ensure that decisions were carried out. Precisely the same conditions existed within the

contract, women ceded their natural right to their husbands, saving only their right to preserve their own lives, they lacked competence to enter the civil bond. Equally to the point, of course, is the converse. *Should women enter the social contract on the same terms as men, men and women could not, subsequently, become husband and wife.* Having yielded up their natural right to the sovereign, while women could contract to provide sexual services, or child-bearing services or housekeeping services, these were ordinary exchange contracts like others in civil society, not contracts conferring sovereignty upon the husband. With no legitimate (ie. contractual) authority within the household itself and no possibility of establishing any, law must govern within the family in the same way and to the extent as within the marketplace.

45 Cf. Rousseau's belief that, should women attempt to sustain equality with men, the inevitable outcome was their subjection to men. The only alternative to willing and voluntary submission was subjugation by force. It follows, therefore, that women submit to men because it is to their advantage - given the alternative, absolute subjugation by force (rape?). Rousseau, *Emile*, *loc. cit.*, 134. Rousseau's educational project is specifically designed to eliminate this oscillation between contract and violence. See Ch. 8.

46 Hobbes, *loc. cit.*, 324-26.

household in the absence of clear and authoritative rules regarding matters of common concern. The wills of both men and women were arbitrary and self-interested, and because of the emotional substratum of family life, disputes between them concerning matters of mutual concern might be thought to be *less* capable of rational solution than disputes among men. Thus, paradoxically, because family relationships were emotional and fluid, order within the family depended upon the contractual vesting of authority in matters of common concern upon one adult member, whom Locke identified as the husband. What is very much less clear on Locke's account than on that of Hobbes is why this familial vesting of authority in the husband denied to the wife the capacity to participate in civil society as an equal. For Locke only wives (women?) and slaves lacked utterly civil capacity. Locke explicitly attributes the slave's lack of capacity to his lack of property, extending even to property in his own life and person.⁴⁷ What, exactly, is it that women yield up to their husbands in the marriage contract? Unlike slaves, wives retained power over their own lives, and might by contract or custom possess the liberty to separate from their husbands.⁴⁸ What feature of the husband's authority over matters of common concern eradicated civil capacity? One can only suggest that wives having yielded up their 'executive authority' (will?) to their husbands in matters of common concern simultaneously authorized their husbands to represent them, and they for that reason lacked the capacity, as with Hobbes, to participate in the formation of civil society.

ROUSSEAU AND THE ORIGIN OF FAMILIES

In the contractarian vision of Rousseau, the ideal was to realize that liberty consistent with a like liberty for all. Independence, both moral and economic, was essential. Liberty was to be secured through the formal and explicit downgrading and public denial of recognition and legitimacy to all interests which were incompatible with the demands of autonomy as a theoretical ideal.⁴⁹ Young children were naturally dependent and in need of adult support and protection. Their lack of public status was easy to justify, since, by definition, they were

⁴⁷ Locke, *loc. cit.*, 366.

⁴⁸ Is this, perhaps, another inconsistency, albeit minor? If women ceded up their property in their own persons, even extending to life and death, as in the classic slave contract, would this ultimately have obliterated the distinction Locke sought to draw between conjugal authority and political authority, deprived him of the substance of his argument against Filmer? Whereas Filmer had derived the authority of the state directly from patriarchal authority, seeking to legitimate thereby monarchic rule, Locke argued that authority within the family and authority within the state were fundamentally distinct. While the state possessed legislative capacity and had the power of life and death over those subject to it, the father lacked both legislative authority and power over life and death.

⁴⁹ On Rousseau's fear that partial societies within the state would subvert the expression of the general will, see Rousseau, *The Essential Rousseau*, *loc. cit.*, 27 where he notes that 'when there are factions, lesser associations detrimental to the greater one, the will of each of them becomes general in relation to its members and particular in relation to the state.' As Rousseau himself recognized, this demand ultimately reflected his desire that each citizen maintain an absolutely independent cast of mind and judgment.

not equals. Justifying the subordination of women would appear more difficult and ambiguous, since Rousseau quite unambiguously emphasized the equality of women and men in the 'state of nature'.⁵⁰ It is worth exploring how this was done and the steps by which women came to be excluded from the social contract.

The transition from nature to society was mediated by a critical development, private property. Rousseau's account of the origins of property is striking. In his historical anthropology, as proto-humans gradually became more social and more industrious, they began to use tools and constructed huts. Out of these developments, he argued, came the

*period of a first revolutionary change that established and distinguished families, and introduced a kind of property, in itself the source of much quarrelling and fighting.*⁵¹

Of what kind of property is Rousseau speaking, wattle and daub huts, or a development equally critical to his philosophical anthropology, the origin of families, or both? For Rousseau the development of proprietary relationships and family relationships seem conceptually interwoven, at least in their consequences for human beings. By the next paragraph both the pre-social equality between men and women and the proto-families which followed have been replaced by the patriarchal family. Rousseau tells us that the

*women grew more sedentary and became accustomed to keeping the hut and the children while the men went off in search of food for all.*⁵²

Charvet comments that this

*primitive social condition [which] Rousseau sees . . . as sort of golden age plays an important role in his thought about social man. . . . Something of the same idea, that is of economically self-sufficient families enjoying an independent, i.e. non-essential intercourse with each other recurs from time to time in his various writings as an ideal human existence. It is an existence which is clearly both human and social, and yet at the same time lacks most of the corrupting and competitive pressures of society associated with the activity of our amour-propre and the dependence of men on each other.*⁵³

What is significant is the degree to which this supposedly idyllic vision contains all the ingredients which foreshadow its destruction. First, while men and families remain independent and self-sufficient women have become dependent upon male provision, a profound contrast to Rousseau's earlier description of a life style in which men and women came together only for sexual encounters and in which women provided for themselves and

⁵⁰ Rousseau, *The Essential Rousseau*, loc. cit., 157-158.

⁵¹ *Ibid.*, 176.

⁵² *Ibid.*, 176-177.

⁵³ Charvet, loc. cit., 22.

their children unaided. Dependence, specifically the dependence of women upon men, is already present in this golden age, as are specialization and a primitive division of labour.⁵⁴ Surely, the golden age is long past, given that Rousseau argued that

*as soon as one man realized that it was useful to have enough provisions for two, equality disappeared, property came into being, work became necessary, and vast forests were changed into smiling fields . . . in which slavery and poverty soon germinated and grew with the crops.*⁵⁵

Likewise, whilst Rousseau asserts that the establishment of families brings profound benefits in the form of conjugal love and *paternal* affection, this seems contradictory in light of his earlier assertion that '*only in society has love, like all the other passions, acquired the impetuous ardor that so often makes it harmful to men,*⁵⁶ serious strife over sexual partners being unlikely prior to the advent of relatively complex forms of social life.⁵⁷ In society, however,

*the jealousy of lovers and the vengeance of husbands daily cause duels, murders, and even worse; . . . the duty of eternal fidelity only gives rise to adultery; and . . . the very laws of continence and honor necessarily increase debauchery and multiply the number of abortions.*⁵⁸

His own logic, therefore, traces the origins of inequality to the establishment of families. It suggests further that the development of private property and of family life are conceptually intertwined, and that, whatever the benefits derived from these linked developments, the costs outweigh them.

Despite this, as will be seen in the next chapter, both his educational project and his social contract theory are dedicated to the reestablishment, not of the state of nature, but of this 'golden age', peopled he suggests by '*true children of love and leisure*'.⁵⁹ Here, men have become fully human, both human emotions and human capacities fully in play. Despite the appearance of jealousy and discord along with love and other gentle sentiments, this era

54 On the evils of dependence and their relationship to the social division of labour, see Rousseau, *The Essential Rousseau*, *loc. cit.*, 179-183. Cf. Charvet, *loc. cit.*, 22-23.

55 Rousseau, *The Essential Rousseau*, *loc. cit.*, 180.

56 *Ibid.*, 168, 176-177.

57 Rousseau explicitly notes that in relatively simple societies, such as that of the 'Caribbeans' the sexual passions do not lead to jealousy and quarrelling. Something similar is undoubtedly at work in his description of the men and women of his early idealized families singing and dancing together, '*true children of love and leisure*'. *Ibid.*, 168, 178. Only as social relations become more intense, competitive and enduring, only when *men* are compelled to cooperate in order to survive do the destructive passions predominate, necessitating law and justice. *Ibid.*, 169, cf. 180.

58 *Ibid.*, 169.

59 *Ibid.*, 178.

*midway between the indolence of the original state and the irrepressible activity of our egotism, must have been mankind's happiest and most stable epoch.*⁶⁰

The benefits were noted earlier, the advent of conjugal and paternal love. With the advent of family life, men become fathers, a crucial development. Rousseau comments in passing upon the concern of paternal authority with the welfare of the child, and the inexorable progress of the relationship between father and child (son?) towards equality. He notes further that

*rather than saying that civil society derives from paternal authority, we ought to say that the latter draws its greatest strength from the former. No man was ever recognized as the father of several children until children began remaining with their fathers.*⁶¹

What Rousseau appears to be trying to suggest is that the development of the passions is essential, even if this first development carries within itself the seeds of all man's destructive tendencies. The social question then, is how these benefits may best be realized while minimizing the costs. Rousseau desires to preserve the love and concern manifest by father for child, in order that they may be implanted in the wider society, and to safeguard against the jealousy and lust for power over others which have accompanied their development. Dependence and an almost contemporary division of labour appear unexceptional within families. Rousseau introduces them without comment and in the course of a single line. Why do these same phenomena become pernicious when they permeate relationships among men and why must they be reinforced and safeguarded in the relationships between men and women? Why is it that men and women can engage in cooperative relationships without socially destructive effects, while cooperative relationships among men inevitably lead to the need for laws and for the rules of justice?⁶² If we can answer these questions, we shall be much closer to understanding the way in which these ideals demanded the excision of women from the body politic.

FROM NATURAL EQUALITY TO CIVIL SUBORDINATION

Early social contract theory is marked by two features. In the state of nature, equality was both natural and universal with respect to adult individuals. In civil society, this natural equality has been replaced by full formal equality among men, and by the inequality of women and their excision from the body politic. Logically, if early liberals had remained faithful to their purportedly individualistic premises, and to their insistence that men and women were equal in the state of nature, women should have been equal parties to the social contract and their rights protected by it. Equally uniformly, they were not, but submerged in family relationships. The choice may have been between civil inequality and the exclusion of law

⁶⁰ *Ibid.*, 179.

⁶¹ *Ibid.*, 190.

⁶² *Ibid.*, 181. Cf. n. 26 and the associated text.

from family relationships, or fully civil equality and the implementation of a full legal regime within the family. No alternative existed, given prevalent assumptions about human nature. If women were to be equals in civil society they must be perceived as remaining similar to men. Given prevailing assumptions concerning human nature, taking such a step would have ratified their natural equality and specifically affirmed women as independent, competitive, acquisitive beings who would naturally strive to realize their interests in competition with men. Equally rational and equally independent, women would not willingly submit to any restriction to which men did not submit. Like men, they would recognize no interpersonal obligations other than those created by contract, would be bound only by their own consent. The natural inequality of children would render them pawns at the mercy of their parents' interests. If competition was to prevail within family groups as without, the image of domestic bliss must be replaced with that of potential strife. As with market relationships, should disputes arise, these must be resolved by law. If no natural internal authority existed within the family, if family relationships were simply consensual relationships between two independent legal persons, establishing the concrete terms and incidents of marriage would be a matter for private law, freedom of contract prevailing. While, as with private commercial contracts, wills or trusts, the state would have power to establish what must be done for marriage to have legal force, it could not impose a common contract upon all those who desired to marry, any more that it could establish the particular terms and conditions of every commercial contract, will or trust.

Early liberal thinkers instead affirmed the independence of men, and the dependence of women. If only men were independent, they could agree to regulate family relationships amongst themselves, protect their interest in the integrity and security of their households from the potentially unrestrained passions of other men. Because married women had no independent public existence, were effectively chattels, the state might intervene to protect the family against outsiders, but its power did not extend inside the household itself. Private freedoms remained secure. The control of husband and father over wife and children maintained his independence and authority. The force of sexual desire threatened cooperative relationships among men unless, like conflict over other species of property, it was governed by the rule of law. The problem was simple. Access to women must be regulated by rules to prevent conflict and establish paternity, however the necessary regulation threatened to destroy altogether the existence of a realm of private freedom unless the authority of the state ended outside the household itself. If women were equally public persons and entitled to demand that their agreements with their husbands be enforced according to their terms, no such limits existed.

The tension between the need for control and the demand for liberty was resolved by denying women independent legal personality. Control over women became a prerequisite to masculine cooperation. Control over sexuality and sexual relationships could be reconciled with individual liberty if men have essentially absolute authority over women, if women are compelled to rely upon them for support and protection. Masculine authority over women in

turn, secured paternity and made possible the transmission of property from generation to generation. If women were acknowledged to have equal rights and liberties in civil society, male authority over them must be seen as unjust. Despite their natural liberty and equality in the state of nature, these must be realized through voluntary submission to the rule of the husband. In the private marital contract (a contract between equals) the wife ceded her natural liberty to her husband in exchange for his support and protection. The civilly instituted marital contract paralleled the social contract, except, of course, in Rousseau, who remained ambivalent.⁶³ If every woman was subject to the rule of either her husband or her father, and every man subject to the laws of the state, the rule of law would replace the uncertainty and chaos of the state of nature.

The liberal vision of the just commonwealth depended both upon the idea that, by contract, equals agreed to relinquish their natural liberty to the state, empowering it to resolve conflicts among them, and upon the necessity for a single standard from which could be derived the specific rules needed in civil society. Despite the explicit denials of early liberal thinkers, the authority of the state was (and is) very like the authority of the father in patriarchal pre-liberal society. Just as the stability and justice of civil society depended upon a single legitimate source of authority with the capacity to resolve conflicts among its members in a way which was fair to all, conflicts within the private society of the household could only be avoided or resolved if a single standard or authority existed there as well. This authority was the father, and his power was preserved and entrenched by denying that women were parties to the social contract and entitled to rank as public persons within civil society. This both secured the position of husband and father within the family, and established a zone of private freedom within which the authority of the state could not run. Even this ordered vision, one based upon the need for a single authoritative standard to order the competition of arbitrary wills, however, fails to answer one last question. Given that the husband possessed essentially absolute power within the household, and given that unconstrained by law, his will was

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Rousseau oscillated between a sentimentalized vision of the family and a vision of marriage as a civil contract. In 'Discourse on the Origins of Inequality Among Men' he described the family as a *'small society, all the better united because mutual attachment and freedom were its only ties.'* *Ibid.*, 177. Here, there is no suggestion of promises, of mutual obligations, of a contractual relationship between man and woman. Rather, the image is wholly sentimentalized, focuses upon the development of conjugal and paternal love. (Maternal love, presumably, took care of itself.) By the time he wrote 'The Social Contract', however, while acknowledging that the family is the only natural society, the imagery has wholly altered. Having described the family as the only natural society, he goes on to state that *'the family is the first model of political societies: The father corresponds to the ruler, the children to the people; and all, having been born free and equal, give up their freedom only for their own advantage.'* Several elements are, however, notable. First, woman has become invisible. Second, the image of bargain or contract has been extended to the children. The tacit claim is that (male) children obey the commands of the father in order to secure a share in their patrimony. Finally, in his accompanying notes, he defends the civil nature of marriage, asserting that *'marriage . . . being a civil contract, has civil effects without which society cannot even exist.'* *Ibid.*, 9 & 123.

necessarily arbitrary, why was the family not perceived as a miniature state of nature in which life remained nasty, brutish and short, and not the idyll of affect and contentment suggested by Locke and Rousseau at least? How did the fraternal bond of the social contract eradicate this⁶⁴? Why were men believed *more* likely to exhibit restraint within the family, that domain where affect reigned supreme and reason played a subordinate role, than in their relationship with their fellow men? Why was emotion less dangerous here? Rousseau came closest to answering this question, and, as we shall see in the next chapter, his answers are profoundly revealing.

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Contemporary statistics on domestic violence suggest that in altogether too many households the family remains a limited state of nature in which life remains nasty, brutish and short. Where retaliation eventually occurs, of course, it is often fatal.

CHAPTER 8

FORCING MEN TO BE FREE - THE EDUCATION OF CITIZENS

INTRODUCTION

In the last chapter, having come to the realization that any attempt to develop an egalitarian account of marriage within the theoretical structures offered by Rawls and Dworkin drew us towards an account of marriage and family life in which obligations were spelled out and made fully concrete and particular, and in which those obligations were a legitimate matter of public concern, we returned to early social contract theory and explored the treatment of marriage and family relationships contained therein. As we explored the accounts offered by Hobbes and Locke in particular, we recognized that two very different interpretations were available of the marriage contract in early social contract theory, one emphasizing subjugation compelled by force and the other emphasizing the irrationality of the passions and the threat posed by love and intimacy to relationships among men. While these accounts did offer an alternative designed to avert the possibility that family relationships would simply be assimilated to ordinary exchange relationships in civil society, or, alternatively, subject to a detailed legislative regime to ensure equality prevailed, neither is compatible with the egalitarian suppositions of contemporary theorists. Now it is time to turn to another, very different account, one which endeavours to escape the alternatives posed by Hobbes and Locke and which seems, at least on its surface, more compatible with some of the structural assumptions of contemporary theorists.

Unlike Hobbes and Locke, Rousseau confronted many of the implications of the liberal account of human nature directly, and, in particular, attempted to come to terms with the full implications of many of its more central assumptions: the spectre of competing and arbitrary interests and wills, the dichotomy between reason and passion, the full implications of an account of human beings which insisted that obligations originated in the will of the individual. For Rousseau, the central question was how individuals could live together in community and yet, at least subjectively, remain free. If his solutions remain fundamentally unsatisfying, and curiously anti-liberal in their implications, his questions remain both accurate and profound. Indeed, I believe it is fair to suggest that Rousseau set the agenda for contemporary egalitarian theory, and that the problems he posed and the questions he sought to answer have yet to be resolved satisfactorily. As we explore Rousseau's account of human nature, his account of the just society, and his account of marriage and family life, two factors must be kept in mind. Rousseau sought to avert both the potential for subjugation by force always present in Hobbes and that of a state ultimately governed by shifting alliances of arbitrary interests and wills underlying Locke. Second, he sought an account of marriage and family life which simultaneously ensured that it would remain private, beyond the reach of law, and which did not simply collapse into subjugation by force. Because Rousseau confronted

questions such as these directly, and because many of his ideas find direct parallels in the arguments put today by Rawls and Dworkin, it is important that we explore his account in some depth and begin to trace the connections which may be drawn.

Rousseau came closest to expressing the theoretical imperative underlying the exclusion of women and displayed the most sophisticated understanding of why it was essential. In his ideal vision of a community of equal citizens, equality and submission to the general will could only be achieved by downgrading and defeating all those conflicting aims and interests which might interfere with its realization. Citizens, he realized, at least citizens of the liberal republic, must be made. No one was born a citizen, indeed, men must be forced to be free.¹ While Rousseau is easy to dismiss as the liberal patriarch par excellence, this dismissal is facile and suggests a failure to come to terms with the problematic nature of certain liberal ideals. Uniquely among early social contract theorists, Rousseau fully understood the ideological imperative implicit in liberal ideals.

Liberalism could not remain merely a weak set of universal norms which served the minimal function of securing the individual against force, coercion and fraud. Weak norms such as these were lacking in two quite different respects. First, they lacked the moral stature needed if independent individuals were to realize themselves as a community of equal citizens. If men obeyed the law solely out of fear and out of the need for protection against their fellows, they would be no more than slaves. Rather than obeying a law they gave to themselves, which Rousseau defined as freedom, they would be subjects. Second, and far more importantly, such norms were incapable of resolving the problem of independence. If liberalism demanded no more than universal norms of liberty and formal equality, true independence could not be realized. Men would remain dependent upon the good will and opinion of others and this was sufficient to compromise their independence. For Rousseau, the virtuous man, and, *a fortiori*, the virtuous citizen was ultimately answerable only to his own conscience or moral sentiment. He who depended upon the good will of others in order to survive was nothing more than a slave. He would act, not from conscience or duty or moral sentiment, but out of his subjective need to maintain the good opinion of others. The

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For Rousseau, the central dilemma posed by human society was reconciling the innate and inviolable independence and freedom of the natural human individual with the restrictions of civil society. According to Rousseau, '*since no man has natural authority over any other, and since force creates no right, we can only conclude that agreements are the basis of all legitimate authority among men.*' [Emphasis mine.] See Rousseau, *The Essential Rousseau*, loc. cit., 12. On the nature of the citizen's obligation to the 'sovereign', and upon the supreme danger to the body political posed by the conflict between the partial private interests of the individual and the general will he asserts, '*in order, therefore, that the social pact shall not be an empty formality, it tacitly includes one stipulation without which all the others would be ineffectual: that anyone who refuses to obey the general will shall be compelled to do so by the whole body. This means nothing else than that he shall be forced to be free, for such is the condition which gives each citizen to his country and thus secures him against all personal dependence.*' See pp. 19-20.

imperative of independence, of the autonomous individual, demanded a positive and substantive commitment to equality and to the eradication of all competing ideologies. As a participant in the general will, man's highest duties and most profound responsibilities must be to the government and well-being of the state.² If the virtuous individual was he who depended solely upon his own capabilities to survive, who heeded his inner voice or conscience, and pursued thereby his true interests, the general will of a community of such individuals would represent equally for each a law he gave himself. Each individual would be truly autonomous. In obeying the laws of the state as expressed through the general will, he would necessarily act to further his true interests and be answerable to nothing but his own conscience.³

Rousseau's concern with the moral imperative behind independence and his belief that only fully autonomous individuals were fitted to be the citizens required by the ideal republic induced him to deal at length with the care and education of children. First and foremost, the goal of education was to ensure the development of *men* who realized their natural independence and autonomy.⁴ If man as individual and man as citizen were to be reconciled without corrupting man's nature, man must first realize his natural goodness fully. Only such men would have the independence of mind and spirit to ensure that the state remained just and did not destroy the liberty of its citizens. Only they could participate authentically in the general will. Thus, in *Emile*, he argued that boys were to be educated to freedom, that the moral habit of independence of spirit and judgment could only be achieved

2 If man were to gain moral freedom from his role as citizen, specifically freedom from his appetites and from the danger that they would lead him into dependence upon other, and gain the moral stature which attends obedience to duty, the republic itself must be constituted so as to make this possible. Thus, Rousseau emphasizes the necessity of '*a high degree of equality in rank and wealth, without which equality in rights and authority could not last long. And finally, little or no luxury, for luxury is either the effect of wealth or makes wealth necessary; it corrupts both the rich and the poor: the former by possessiveness, the latter by covetousness; it sells the country to indolence and vanity; it deprives the state of all its citizens by enslaving some to others, and all to public opinion.*' *Ibid.*, 57. Equality was not merely, in his vision, a formal ideal, it was a substantive moral imperative.

3 Rousseau envisioned law (as established by the general will) as an *internal* moral constraint on individual conduct. In the society foreshadowed by the social contract the restrictions imposed by law would be identical to the restrictions imposed by the conscience of the individual. Unlike Hobbes, for example, he did not view law as simply putting up the costs of the actions it forbade.

4 Early in *Emile*, while discussing the obligation of the father to educate his children (read sons), Rousseau asserts: '*A father has only done a third of his duty when he begets children and makes provision for them. To his species, he owes men; to society, he owes social beings; to the state he owes citizens.*' Rousseau, *Emile*, *loc. cit.*, 18. Rousseau believed that only men who had been educated to realize their natural independence could truly be worthy citizens, precisely because, as he said, '*liberty is not to be found in any form of government. It is in the heart of the free man.*' *Ibid.*, p. 165. Such a man might truly realize the benefits of the civil state and would willingly dedicate his life to it.

through careful and consistent guidance and training so that the child came to do what was right as if he had discovered it for himself. At every stage the illusion must be fostered that it is the child, and not the tutor, who is in control. Like the citizen, the child must be forced to be free. Rousseau's romantic model for the education of the wealthy and orphaned Emile parallels the rationalist ideal of attaining true freedom through obedience to self-given laws. Just as Emile was to become both free and independent through carefully concealed guidance designed to ensure that he would, as if of his own will, follow the correct path, citizens, through their voluntary submission to the general will, would realize true independence.⁵

Rousseau's account of the education of Emile bears a striking resemblance to the conception of the individual which dominates the contractarian state of nature. Ideally, he encounters the natural world alone and nature is his only teacher.⁶ Through his developing rational powers, he unlocks the secrets of nature, conquers the natural world and achieves control over it. For Rousseau, *'the true freeman wants only what he can get, and does only what pleases him.'*⁷ Throughout these passages, the emphasis remains upon what the individual can obtain unaided, solely through the use of his own powers. He must be thwarted only by natural obstacles. Rousseau believes that

*there are two kinds of dependence: dependence on things, which is natural, and dependence on men, which is social. Dependence on things being non-moral is not prejudicial to freedom and engenders no vices: dependence on men being capricious engenders them all.*⁸

For Rousseau, *'obedience to self-given law [was] freedom.'*⁹ Like the individuals in the state of nature, Emile has no binding affective ties, no experience of the mutual pleasures and enduring bonds of family life. He has neither natural relationships nor natural obligations.

5 Rousseau believed that true education took place only when the child was required to learn nothing, and therefore learned only what he *'felt to be of actual and present advantage'*. *Ibid.*, 51.

6 Cf. Rousseau, *The Essential Rousseau*, loc. cit., 162, where he comments *'it is impossible to imagine why, in that primitive state, one man should need another any more than a monkey or wolf needs another of its kind; or, assuming such a need, what might induce the other man to satisfy it; or, if he was willing to do so, how the two of them could agree on the conditions.'*

7 Rousseau, *Emile*, loc. cit. 35.

8 *Ibid.* It is critical to note that Rousseau believed that, in society, dependence upon others could only be subverted through dependence upon the law of the state, upon the realized general will, because this represented the jurisgenerative capacity of the individual. Cf. Rousseau, *The Essential Rousseau*, loc. cit., 17-18, where Rousseau speaks of the social contract as one in which each man surrenders himself with all his rights to the whole community, p. 20 where this total surrender is stated to secure him against *'all personal dependence.'*

9 *Ibid.*, 21.

Binding emotional ties and dependence upon the actions and the opinions of others corrupted the drive to freedom and made authentic independence of mind, spirit and body unattainable. Those guided by the opinions of others were not free and for that reason were not fitted to act as citizens, participate in the general will. They abrogated their own rationality. Children must be educated by nature, allowed to discover the principles of proper conduct and understanding uninfluenced by the corrupt world around them. In particular, young boys must be shielded from the temptation to their own sexuality posed by women until they have attained mature and rational judgment.¹⁰ Just as the laws of nature guided the human children of Rousseau's imagined pre-social world, they must guide the education of the young Emile. In this way male children were to become both natural men and, ultimately, virtuous citizens.

The education of young girls was very differently conceived. No hint of natural freedom, of independence remained. If the virtuous man depended solely upon things and never upon the opinions of others, the virtuous woman must be wholly ruled by the opinions of others. Girls were destined to become the *mothers* of future citizens, and their education must be shaped to ensure their fitness for this role. Here too, nature must guide education, but for girls the only natural facts of importance related to their reproductive role and what Rousseau believed to be an innate tendency towards self-adornment and the development of domestic skills.¹¹ Thus, despite the absolute equality and independence of both sexes in the pre-social state, Rousseau's concern is to prepare girls to become the virtuous wives and mothers required by patriarchal society.¹² Unlike Emile, Sophie was not an orphan but blessed with

10 Significantly, given the symbolic connection between woman and nature, the occupation chosen to divert Emile from premature pre-occupation with sexuality is hunting. Rousseau justifies selection of what he characterizes as a 'cruel passion' by asserting that '*it is enough for me that it serves to hold back a more dangerous passion and allows him to listen to me calmly when I speak about it.*' Rousseau, *Emile*, loc. cit., 119-120.

11 *Ibid.*, 137-141.

12 Here it is important to contrast the description of pre-social woman in the '*Discourse*' with the description of social woman in '*Emile*'. In describing the transition from natural, proto-human freedom to primitive patriarchy, Rousseau notes '*this was the time when the first differences appeared in the two sexes' way of living which had previously been the same.*' See Rousseau, *The Essential Rousseau*, loc. cit. 176. This passage ought to be contrasted with the following passages from *Emile*. After noting that '*in everything that does not relate to sex the woman is as the man: they are alike in organs, needs and capabilities*', Rousseau continues '*it is the part of the one to be active and strong, and of the other to be passive and weak. Accept this principle and it follows in the second place that woman is intended to please man. . . . This is not the law of love, I admit. But it is the law of nature . . .*' Rousseau, *Emile* loc. cit., 131. These passages raise a very simple question. What is it about civil society that has the capacity to alter the nature of woman, and, further to the point, why is *this* change desirable? The answer follows directly. As Rousseau notes, '*by giving woman the capacity to stimulate desires greater than can be satisfied, nature has made man dependent on woman's good will and constrained him to seek to please her as a condition of her submission.*' *Ibid.*, 132. Rousseau's statement of the problem is clear.

parents and siblings she must learn to serve. Submission and self-sacrifice cannot be learned in isolation. Girls were to be trained and educated, not to independence, but to the recognition that their lives and their happiness depended upon their capacity to please a man and secure his continued support and care for themselves and their children. For them, nothing should be of greater importance than the good opinion of others.

Rousseau did not go beyond this and assert that women were incapable of independence and citizenship. For women, independence and citizenship were inappropriate, not impossible.¹³ If such attainments were beyond women, it would not have been nearly so important to ensure that all traces of independence were eradicated. Rather, he claimed that these ideals were inappropriate applied to women and that their realization would destroy the private world of the household and the family and inevitably lead to the corruption of both men and women. Rousseau argued that the education of girls ought to reflect their future roles as wives and mothers, offering as proof his belief that

*on the good constitution of the mothers depends that of the children and the early education of men is in their hands. On women too depend the morals, the passions, the tastes, the pleasures, aye and the happiness of men. For this reason their education must be wholly directed to their relations with men. To give them pleasure, to be useful to them, to win their love and esteem, to train them in their childhood, to care for them when they grow up, to give them counsel and consolation, to make life sweet and agreeable for them: these are the tasks of women in all times for which they should be trained from childhood.*¹⁴

For Rousseau, this constellation of attitudes and attributes was far more critical than for other social contract theorists because he believed that the just state depended upon far more than contract, it depended upon the devotion of the citizen to the state, and this devotion originated in the experience of love and loyalty within the home.¹⁵

ROUSSEAU AND THE NATURE OF LOVE

In an imagined pre-social world, male and female are equal. With the beginning of society, and that dependence which attended the need for a *particular* other, male and female were no longer equal. Because women aroused male sexual desires and need not satisfy them, p. 132, because fatherhood was seen as the connection between the individual and the wider community and it depended both upon female morality and upon the mother's proper performance of the maternal role, p. 16, a natural imbalance developed. The balance could only be restored by ensuring that women devoted their lives to pleasing men, thus, I would suggest, restoring for Rousseau the initial position of equality. *Ibid.*, 134-135. Cf. Rousseau, *The Social Contract*, *loc. cit.*, 250.

¹³ Cf. Rousseau, *Emile*, *loc. cit.*, 134 where Rousseau acknowledges that women have the capacity to be educated in the same way as men.

¹⁴ *Ibid.*, 135. Rousseau anticipated both the separate spheres ideology and the conception of motherhood as a vocation discussed in Ch. 5. Here, as elsewhere, his prescience is remarkable.

¹⁵ Rousseau, *Emile*, *loc. cit.*, 133.

Uniquely among early social contract theorists, Rousseau sought and account both of the state and of family life which recognized the importance of the passions, and recognized equally that to be fully human was also to be fully social, a member of a community. His attempt to reconcile the potential for conflict created by our (arbitrary) passions and the relationship of our social emotions to the possibility for moral conduct led him to deal at length with family life and with love in *Emile*. It is significant that, in his educational programs for boys and girls, Rousseau is recreating and synthesizing two very different periods in his historical anthropology. The model for the education of boys reflects the natural freedom of the proto-human state, when man's needs were limited to food, a female, and rest.¹⁶ Yet Rousseau idealizes, not this period, but that which replaced it, the golden age in which the first patriarchal families emerged, and in which both man's intellect and his passions were first stirred.¹⁷ For Rousseau the problem was both to educate a natural man who might grow up free of the vices to which social men were prey, yet to do this in such a way that the intellectual powers and moral sentiments essential to social man might flourish, uncorrupted by the vices which he had previously argued inevitably attended them.¹⁸ In light of his desire to preserve both the absolute independence characteristic of the pre-social state, and to attain the intellectual and moral benefits which could only arise in the social state, an avenue had to be found through which the harmful and corrupting elements in the passions might be transformed and given a positive role. This was the family, a purified and idealized family in which no possible occasion arose to stir destructive passions such as jealousy.¹⁹ His intent is made clear when, in *Emile*, he stimulates his pupil's imagination with the image of an 'ideal woman', Sophie. About this Rousseau comments,

*people are more in love with the image they make for themselves than with its object. To see what we love exactly as it is, would make an end of love on the earth.*²⁰

¹⁶ Rousseau, *The Essential Rousseau*, *loc. cit.*, 154. Cf. pp. 155-172.

¹⁷ *Ibid.*, 176-180. Here, it should be noted that I follow Charvet, *loc. cit.* and Horowitz, *loc. cit.* in treating 'The Discourse upon the Origins of Inequality Among Men', 'The Social Contract' and *Emile* as both emblematic of Rousseau's fully mature thought and as inextricably linked. Essentially the 'Discourse' poses the problem to which *Emile* and the 'Social Contract' are, together, meant to provide the solution.

¹⁸ *Ibid.*, 178-184. Cf. Ch. 7.

¹⁹ Cf. the discussion in Ch. 7.

²⁰ Rousseau, *Emile*, *loc. cit.*, 121. Cf. Charvet, *loc. cit.*, 111-117, esp. his comment at p. 114 that 'love, for Rousseau, is not a relation in which both lovers are present to each other in respect of their real qualities, but in respect of ideal qualities which they do not possess, but which it is necessary for each to attribute to the other for them to be capable of love at all.'

Charvet put the matter particularly clearly in his comments upon the nature of love in Rousseau's writings. He observes that, given Rousseau's ideal of detachment,

the point is, however, that one possesses them and is not possessed. . . . The enjoyment consists in having things and persons dependent on one and subject to one's control without oneself being dependent on them in return. . . . There is no commitment of oneself to what one makes one's own, no external dependence and so no danger to oneself. . . . But this form of possession . . . is none the less another form of personal imperialism. For it involves the attempt to appropriate the world and other without offering anything in return. In respect of human relationships it requires the dependence of the other, the commitment of the other to oneself, but not one's own to the other. For in so far as both attempt to play the same game, there will be nothing for either to enjoy, the mere facade of a human relationship, in which each keeps himself securely apart. And a world of such men would be a barely human world, the mere empty shell of such a world, in which each, in trying to guard the treasured possession of his independent and purely self-determined identity, is left guarding an empty chamber and a vacuous self.²¹

Understanding the problematic of love in Rousseau, and its intimate relationship to the demand for independence, sheds substantial light upon precisely how and why, when Rousseau came to deal with the education of girls, no shadow remained of his early account of proto-social freedom and absolute equality. As discussed earlier, in Rousseau's historical anthropology, both men and women were initially fully equal, capable of surviving on their own in an isolated and semi-nomadic existence. It has, in fact, been suggested that, if anything, women were more than merely equal in that they were easily able to provide for both themselves and their young unaided.²² By *Emile*, the 'natural' woman is already a social being, a member of a family, trained from infancy to perceive herself solely in relation to others. The educational project for girls is designed to reproduce, not the proto-human natural woman, as capable of fending for herself as her mate, but the wives and mothers of patriarchal society, of Rousseau's golden age. This second stage has come to represent the 'natural woman' and, indeed, Rousseau proceeds to argue that it is the law of nature that 'woman is made to please and to be dominated', apparently because she is the passive partner in sexual relations.²³ Still more tellingly, in following up his claim that women are made for obedience, he argues further that

being destined to obey a being so imperfect as man (often with many vices and always with many shortcomings), she must learn to submit uncomplainingly to unjust treatment and marital wrongs.²⁴

21 *Ibid.*, 117.

22 Okin, *Women in Western Political Thought*, loc. cit., 111.

23 Rousseau, *Emile*, loc. cit., 131.

24 *Ibid.*, 140.

No two accounts could be more different. The education of boys was to enable them to realize their natural freedom, and, eventually, to enable them to be brought to full human maturity through the acquisition of the gentle passions, love and paternal affection. The education of girls was intended to instil docility, submission, and essentially unquestioning obedience and self-sacrifice. Men were destined through the realization of their natural freedom and the awakening of the moral passions to become both truly independent men and members of the state, women must aspire neither to independence nor to citizenship, but must perceive their entire existence relative to men. Again, it is necessary to ask why. Broome²⁵ suggests that Rousseau was simply reproducing male views as prevalent then as now that women ought to be assigned a domestic role, but neither this, nor his subsequent suggestion that woman's natural dependence (arising from her childbearing role) directs her self-interest towards always seeing herself as relative to man and seeking to please him²⁶ begin to account for the fact that for Emile the rule of opinion is the enemy of morality, whilst for Sophie an almost unquestioning acceptance of authority and reliance upon the opinions of others is the only morality thinkable. To find answers, we must look rather further.

In many ways, the education prescribed for Sophie serves dual purposes. Sophie who has been nurtured on illusion like Emile²⁷ provides a mirror in which Emile may see himself larger and more perfect than life. Given Rousseau's description of her as having '*taste without study, talents without art, judgment without knowledge [and] a mind which is still vacant but has been trained to learn*',²⁸ it is difficult to imagine what else she might be. What she lacks, indeed, what her whole education has been devoted to ensuring that she might not develop, is the sort of independence Emile's entire education has been dedicated to fostering. If Emile is to represent the universal in mankind, the man who must remain inwardly apart from all particular attachments and passions²⁹ since it these which engender dependence and all the vices to which social man is prey, Sophie represents the particular. She must evaluate her own conduct, not inwardly, but in terms of the responses of others, of the effect it produces. Thus, having argued that '*woman is made to please and to be dominated*', the moral precept

²⁵ J.H. Broome, *Rousseau: A Study of His Thought*, London, Edward Arnold (Publishers) Ltd. 1963, 98-99.

²⁶ *Ibid.*

²⁷ Cf. Rousseau, *Emile*, *loc. cit.*, 152, where Rousseau specifies that Sophie has already fallen in love with a character in a romantic novel before she meets Emile.

²⁸ *Ibid.*, 153.

²⁹ Cf. *ibid.*, 160-161, where Emile is told that he must '*learn to lose whatever can be taken from you, and to rise above the chances in life. Then you will be happy in spite of fortune and wise in spite of passion. In the good things which are most fragile you will find a pleasure that nothing can disturb. They will not possess you but you will possess them; and you will find that in this passing world man only enjoys what he is ready to give up.*'

immediately follows that '*she ought make herself agreeable to man and avoid provocation*.'³⁰ Her existence is to be entirely relative, relative first to the needs of her husband and lover, in that it is necessary for him to possess her but not be possessed by her,³¹ and later to the needs of her children. Of the mother-child relationship, Rousseau observes '*no mother, no child*'³² and shortly thereafter, '*the best nurse would be the mother if she were prepared to take her instructions from the tutor*.'³³ [Emphasis mine.] In any case, only one person ought to be in charge of the child throughout his education, and ideally that person is the father.³⁴ If the father is the tutor, and the mother, if the child is male, confined to the nurturing role in compliance with the precepts laid down by the father, the goal may be best attained. Hence, Sophie is to be taught to be industrious, instantly compliant to authority, used, as Rousseau says, '*to be stopped in the middle of [her] play and put to other tasks without protest . . .*'³⁵ Indeed, until the age of reason, perhaps twelve or thirteen, '*good or bad for young women is only what those around them so regard*.'³⁶ At this point, external authority must be reconciled with conscience or moral sentiment, and this, Rousseau assures us, requires reason, but reason of a very limited kind. The sole precept required is simple:

*The obedience and loyalty she owes to her husband and the tender care she owes to her children are such obvious and natural consequences of her position that she cannot without bad faith refuse to listen to the inner sentiment which is her guide, nor fail to recognize her duty in her natural inclination.*³⁷

Presumably, then it is sufficient that woman be loyal and obedient, and willing to devote herself utterly to husband and children. The capacity for detachment and yielding to necessity essential to ensure the natural man would not become prey to the opinions of others and the desire to secure both things and others utterly, to bind them to oneself, has been replaced by the arational devotion of a faithful pet.³⁸

30 *Ibid.*, 131.

31 Cf. n. 27, and see also Charvet, *loc. cit.*, 111-117.

32 Rousseau, *Emile*, *loc. cit.*, 17.

33 *Ibid.*, 20.

34 *Ibid.*, 18-19.

35 *Ibid.*, 140.

36 *Ibid.*, 146-147.

37 *Ibid.*, 149.

38 Cf. the cost-benefit analysis of marriage of Darwin cited in Ch. 7. Rousseau himself apparently felt that the most essential attribute of the wife was willing submission to injustices and marital wrongs, again the essential characteristics of a devoted pet. Rousseau, *Emile*, *ibid.*, 140.

When one recognizes that, for Rousseau, dependence upon the opinions of others is the ultimate vice, the source of all the evils to which social man is prey, it would appear that woman is to be trained for vice and immorality in order that man be the embodiment of virtue. Put another way, his virtue, in the social state, is profoundly dependent upon her vice. If this simplistic account were, in fact, accurate, its force would wholly undermine his theoretical structure since it would suggest that, not only is his ideal of independence incapable of realization, but also any attempt to realize it will bring a new and uniquely pernicious dependence in its wake, suggesting that human virtue ultimately depends upon evil and lack of virtue in others. This, however, does Rousseau a profound injustice. While he is often apparently inconsistent and occasionally even contradictory, here I am suggesting an inconsistency which goes to the core of his theoretical structure and which vitiates the ideals upon which it is based. For this reason, it is essential to attempt to understand how it can be that what, for Emile, is the ultimate vice, becomes, for Sophie, the highest form of virtue.

Clearly, Rousseau believes that ideals of detachment and yielding to necessity cannot be reconciled either with the duties of marriage or with the care and nurture required by children and the inherent inequality of the mother-child relationship. Here, it is necessary to be cautious, if only because common sense suggests that paramount among those things which must, ultimately, be yielded up, are one's own children, as Rousseau himself emphasizes with respect to the paternal role.³⁹ A simplistic account will not suffice. Emile's willingness to yield to necessity, is paralleled in Sophie by her own carefully inculcated willingness to yield unquestioningly to authority, to put aside what she is doing without question and take up that which is required of her, *so that yielding to his will becomes necessity*. Rousseau is suggesting that a woman who sought to realize independence and freedom in her own life, who would not willingly submit to the will of any other and cared nothing for the opinion of those around her unless it mirrored her own⁴⁰, would both be reluctant to sacrifice her own freedom to the needs of her children⁴¹, and could not provide her husband with security in his reproductive role, thus enabling him to be secure in the experience of fatherhood.⁴² Rousseau emphasizes that the wife *'forms a bond between father and child, she alone can win the father's love for his*

39 Rousseau, *The Essential Rousseau*, *loc. cit.*, 9, where Rousseau emphasizes that the natural bonds uniting fathers and children last only so long as the children remain incapable of independence.

40 Cf. Charvet, *loc. cit.*, 111-113.

41 Cf. Rousseau's observation in *Emile*, *loc. cit.*, 138, that women's way of life does not permit them to devote themselves to their talents at the expense of their duties. Contrast this with his earlier description of Emile at twelve or thirteen: *'Habit, routine and custom mean nothing to him. . . . He never follows a fixed rule and never accepts authority or example. He only does or says what seems good to himself.'* *Ibid.*, 67.

42 *Ibid.*, 16.

children and convince him that they are indeed his own.⁴³ According to Rousseau, only a dependent and submissive wife would be able to convince her husband that the children of her body were the children of his body as well. Her role was to *induce* her husband to love his children and, Rousseau argued, this could only come about through his knowledge of her total submission and dependence upon him.⁴⁴ Love of children was not natural or instinctive, but acquired, a distinctively moral sentiment.⁴⁵ While women ideally learned to love their children through the biological processes of gestation and subsequent care and feeding⁴⁶, men, lacking this concrete and immediate connection to the child, must achieve and sustain the paternal role. Rousseau intuitively grasped the dialectic implicit in reproductive relationships and sought synthesis through the submission of the wife to the mind and the will of her husband. Thus, for him, only the absolute submission of the wife to the will of her husband, only her overriding concern with how her conduct appeared to others, made the illusion of love possible.

Rousseau's recognition of the conflict between independence and freedom and the demands of family life is extremely significant. Within the family, men, women and children, one would think, are bound together by ties of sentiment and by reciprocal needs and desires. As Rousseau recognizes, given the ideal of independence he has developed,

*every attachment is a token of insufficiency. Were it not that every one of us had need of other people, we would scarcely think of associating with them.*⁴⁷

Thus, the conflict between Rousseau's ideal of the virtuous and independent natural man, and the mutual dependencies and reciprocal needs embodied in family life must be resolved.

⁴³ Rousseau, *Emile*, (Foxley edition), *loc. cit.*, 324.

⁴⁴ In 'Discourse on Political Economy' Rousseau summarized the reasons that the husband's rule within the family must be absolute. First, '*in every difference of opinion there must be a single voice to decide*', second, even if one assumed substantial equality between man and woman, woman was, from time to time 'disabled' by her reproductive functions and this was sufficient to favour the man, third, and crucially, '*the husband ought to be able to superintend his wife's conduct, because it is of importance for him to be assured that the children whom he is obliged to acknowledge and maintain, belong to no-one but himself*,' and finally, because children ought to be obedient to their father who has provided for them and provide for him, in turn, in his old age. See Rousseau, *The Social Contract*, *loc. cit.*, 250.

⁴⁵ Cf. Rousseau, *The Essential Rousseau*, *loc. cit.*, 176, where Rousseau attributes conjugal and paternal love to the development of (patriarchal) families.

⁴⁶ Rousseau, *Emile*, *loc. cit.*, 16-17.

⁴⁷ *Ibid.*, 102. What he does not go on to state, is that which follows inexorably from the discovery of this insufficiency, given the ideal of independence. When attachments develop, when this insufficiency is recognized, independence is at once compromised. The opinion and esteem of the needed other become important, and the previously autonomous individual is compromised. This is particularly critical if the attachment deepens into love. Only if the 'love' is simply for an ideal, if no real encounter between authentic individuals exists, can independence be sustained.

Unlike most more recent representatives of male-stream thought, his arguments reflect a clear understanding that the ideal of the absolute independence of spirit and judgment he believed to be central both to individual virtue and to just public decisions and true public morality were impossible to reconcile with the conditions he himself believed to be necessary for the maintenance of family life and the nurturing of children. For the ideal woman to devote her existence entirely to the welfare of her children and to being for her husband only and never for herself is essential to the survival of family life as Rousseau envisions it, and further, and even more centrally, *essential to the development of the conventional bonds upon which the just community is founded*. She is both to forego the existential project of self-creation, and undertake, at least with respect to her husband, a project which comes perilously close to self-immolation, total and willing submission to injustices and wrongs at his hands.⁴⁸

Rousseau's account of the education of the natural man and the 'natural' woman is designed to ensure that there is only one adult person within the family and that person is the husband. He exists for her as that being upon which her entire existence depends, she exists for him as ideal to be possessed, but in no way can she be said to exist as an individual in her own right. As Charvet suggests, in considering the degree to which Emile is capable of encountering and acknowledging the judgments of others,

*in so far as others may be important for him, it will be as backing for himself, as extensions of his own judgement, and not as separate persons. Others will be important only as they reflect and support his own self-conception, so that they can be admitted only by being incorporated into his own identity for himself.*⁴⁹

If, in fact, the 'natural' woman must be no more than a mirror for her man, a reflection larger than life of his own self-conception, it becomes possible to reconcile the apparently conflicting descriptions of family life given in 'The Discourse on Inequality' and 'The Social Contract'. Whereas, in 'The Discourse' the family was a *'small society all the better united because mutual attachment and freedom were its only ties'*, by 'The Social Contract' the father has become the ruler, the children the people, and the mother has disappeared altogether.⁵⁰ Despite Rousseau's assertion in a much earlier work, 'The Discourse on Political Economy'⁵¹, that democratic decision making within the family was out of the question because majority rule was impossible, here he has accounted for the absence of democracy within in the family in a much simpler way, effectively by the absence of the plurality of independent individuals necessary to constitute a democratic society. Within the family, the kingdom of the private

48 Cf. Okin, *Women in Western Political Thought*, loc. cit., 167-172, especially her references to the fates of Emile and Sophie in Rousseau's unfinished sequel, *Les Solitaires*.

49 Charvet, loc. cit., 113.

50 Rousseau, *The Essential Rousseau*, loc. cit., 177, 9.

51 Rousseau, *The Social Contract*, loc. cit., 250-251.

household, only one autonomous individual exists, and he is destined to maintain dispassionate and rational authority over the household he rules, to rule it as he himself ought to be ruled by the general will.

As Charvet suggests, with reference to Rousseau's essential project, that of reconciling natural and social man without reproducing the evils he himself perceived to attend the social state, recognition of particularity must be eradicated.

*He must always be able to treat the other as a mere duplication of himself, so that in acting for the other, he is not acting for a different individual with different ends, whom he wishes to please, but only for the exact replica of himself and his own ends.*⁵²

Rousseau's account of the courtship of Emile and Sophie suggests that this is precisely the project he has undertaken. After describing the utter vacuity of Sophie's mind at the conclusion of her education, Rousseau comments:

Happy is the man destined to instruct her. She will be her husband's disciple, not his teacher. Far from wanting to impose her tastes on him, she will share his.

Subsequently, Rousseau describes Emile as attempting to teach Sophie everything he knows, commenting 'he assumes that he has only to talk and immediately she will listen.'⁵³ Sophie is to become a replica of Emile, and most particularly, of his system of ends. Should she become a person in her own right, a person with ends and projects of her own, recognition of her essential individuality and particularity would, given Rousseau's ideal of independence, either compel Emile to abrogate his own independence in seeking to please her and thus becoming dependent upon her, lead to brutality on his part in enforcing his will, or, alternatively, compel him to withdraw altogether.⁵⁴ In demanding that her husband recognize her as an individual like himself, as one who possessed an independent system of ends, in seeking like him to avoid true commitment, to avoid becoming for the other and dependent upon him, no relationship between them could or would exist. Reconciliation of natural man and social man depends upon his self-creation, on the one hand, and her self-immolation on the other, for only in this way might natural man attain the benefits of the social state without falling prey to the evils which attend the full recognition of particularity. Hence it is, for Rousseau, that a woman's

⁵² Charvet, *loc. cit.*, 145.

⁵³ Rousseau, *Emile*, *loc. cit.*, 153, 156.

⁵⁴ In fact, Rousseau himself foreshadowed this latter possibility in the uncompleted fragments of *Les Solitaires*. Sophie, having become depressed over the death of her daughter, is taken by Emile to Paris. After Emile breaks his marriage vows, Sophie, rejected, herself commits adultery. Emile, unable to bear the thought of Sophie's sharing her affection between his son and the child of another man, abandons both wife and child. See the discussion of these fragments in Okin, *Women in Western Political Thought*, *loc. cit.*, 168-172.

honour depends not upon virtue and good conduct but upon reputation. While '*public opinion is the tomb of a man's virtue, . . . [it is] the throne of a woman's.*'⁵⁵ Only to the extent that she becomes that which it is desired that she be, can she sustain her honour, and he his independence.

INDEPENDENCE AND THE NEED FOR THE OTHER

If Rousseau can be defended against the conventional charge of misogyny, remarks such as these must be demonstrated to follow from the ideal of independence itself. As Rousseau recognizes, while the need of others follows from our nature as social animals and from our inability in the social state to meet all our needs without recourse to the society of others, once we have need of others we risk becoming dependent upon their good opinion. This, he believes leads men to subordinate their own judgment to public opinion, a subordination which enslaves them and destroys virtue. A truly virtuous man is one who desires only that which he can attain unaided and is answerable only to his own conscience. This poses a profound problem in the context of human sexuality. Once men and women formed enduring bonds of love and companionship, their absolute independence was seemingly inevitably compromised by their need for one another, as concrete and particular individuals. Rousseau sought to reconcile the socially constructed reality of family life with the ideals of independence and equality he believed to hold the key to human virtue and to ensuring that no man would be subject to domination by another. The conditions by which men became enslaved were clear. As he said,

*the bonds of servitude are formed only by men's mutual dependence and the reciprocal needs that unite them, it is impossible for one man to enslave another without first having made himself necessary to him.*⁵⁶

If, as he also recognized, within the socially constructed reality of the family, mutual dependence and reciprocal needs appear inevitable, man's independence appeared

⁵⁵ The passage from which this extract comes is worth reproducing in full because it contains a number of remarkable admissions. '*Men and women are made for each other but they differ in the measure of their dependence on each other. We could get on better without women than women could get on without us. To play their part in life they must have our willing help, and for that they must earn our esteem. By the very law of nature women are at the mercy of men's judgments both for themselves and for their children. It is not enough that they be estimable: they must be esteemed. It is not enough that they should be beautiful: they must be pleasing. It is not enough that they should be wise: their wisdom must be recognized. Their honour does not rest on their conduct but on their reputation.*' Rousseau, *Emile*, loc. cit., 134-135. The first point to be made is that Rousseau clearly recognized that the dependence was mutual. The fact that men were less dependent, in his view, than women does not alter the fact of their dependence, their need for the good opinion of women. Thus, Rousseau must deal with the natural consequence of attachments, mutual dependence, in a way which does not compromise the autonomy of the man or abandon the ideal of autonomy altogether.

⁵⁶ Rousseau, *The Essential Rousseau*, loc. cit., 171.

compromised at the outset. Husband and wife cannot but be necessary to each other, for were they not, no enduring relationship could exist. Given that the alternative, following Plato, seemingly demanded the abolition of the private family, which was for Rousseau the wellspring of virtue⁵⁷, a way must be found of reconciling family life and independence, and reconciling thereby, and still more importantly, natural man and social man.

The ideal of liberty could be realized only through walling off those aspects of human relationships and human life by which it seemed threatened. Family life, seemingly the most particular of existences, with its apparent mutuality and the mutual acknowledgment or recognition one might have hoped would be recognized as implicit in human sexuality and reproductive relations, becomes instead an abstract relationship between the autonomous and independent subject and one whose existence and worth are defined by her capacity to reflect for his gaze his virtues and his ends. He remains for himself alone, and she, to the extent that she exists at all, for him only. It is for this reason that nowhere in *Emile* is there any suggestion that *Emile* concerns himself with his physical appearance whereas Sophie's education commences by harnessing her 'natural' instinct for self-adornment.⁵⁸ Perhaps it does not go too far to suggest that if *Emile* is educated to become essentially pure mind, Sophie remains body to his mind in the sense of remaining an object almost devoid of will.⁵⁹ Charvet has suggested, in the course of a sustained and detailed analysis that the mind-body distinction developed in 'The Creed of a Savoyard Priest'⁶⁰, reflects the division in social man 'between his moral will and his "natural desire" to be related to others as a particular.'⁶¹ On this interpretation, the privatized family may be seen as an attempted resolution of the mind-body problem. By effectively denying Sophie mind, except in so far as her 'mind' mirrors *Emile*'s own, and by displacing the conflict between the moral imperative to be and remain for himself

57 For Rousseau's views upon the role of the family in making virtue, and indeed, citizenship, possible, see *The Essential Rousseau*, loc. cit., 176-177; *Emile*, loc. cit., 16-19, 160-161, and particularly where, at p. 132-133, he emphasizes that the bonds of convention always develop from the natural bonds of friendship and family life - 'that it is the good son, the good husband, the good father, that makes the good citizen.'

58 *Ibid.*, 137-138.

59 See the discussion in Ch. 4 of the way the 'private' or privatized family itself assumes the guise of an object, of the 'property' of a public person.

60 Rousseau, *The Essential Rousseau*, loc. cit., 231 ff.

61 Charvet, loc. cit., 108. Cf. the discussion in 'The Creed' at pp. 240-259, and especially at 258-259 where Rousseau comments in respect of the correct principles of conduct, 'What I feel to be right is right, what I feel to be wrong is wrong. . . . Our first concern is for ourselves, yet how often the inner voice tells us that in seeking our own good at the expense of others we are doing wrong! We believe that we are following the impulsion of nature when we are actually resisting her; listening to what she says to our senses, we despise what she says to our hearts; the active being obeys, the passive being commands. Conscience is the voice of the soul, the passions are the voice of the body. . . . Reason deceives us all too often, . . . but conscience never deceives us.' *The Essential Rousseau*, loc. cit.

alone and the social drive for particularity onto a relationship in which he is mind and Sophie represents body, Rousseau hopes to offer an avenue through which natural man and social man can be reconciled and reunited. On such an analysis, privatisation cannot represent an accidental by-product of liberal thought, or the result of simple misogyny, but stands instead as the essential foundation for the construction of a virtuous life and a just public world. If the republic depended for its realization upon the independence of mind and spirit of its citizens, upon their willingness to subordinate all private inclinations and interests to the general will, and upon the mutual recognition as abstract individuals made possible by this fraternal submission, the family depended for its continued existence upon women trained from infancy to subordinate both their inclinations and their intellects and spirits to the needs of their husbands and children. Like citizens, wives and mothers were made, not born.

THE RELATIONSHIP BETWEEN THE FAMILY AND THE STATE

Earlier in this chapter, we explored Rousseau's conception of family life, and, in particular, his attempt to reconcile his clear understanding of the fundamental importance of our social emotions, such as love, with his ideal of the independent individual who remained answerable only to his own conscience. It is important to recognize that Rousseau believed that people were capable of moral conduct, that properly educated, they would *desire* to heed the demands of conscience. In his political theory, Rousseau sought to offer an account of the just commonwealth founded upon this moral capacity. The parallels between his account of the ideal family and that of the just state are striking.

Just as only a single standard or criterion for decision making, conformity to the general will, could provide the secure foundation necessary for the just commonwealth, only a single ultimate authority could secure the home. The virtuous family formed the only secure foundation for the virtuous state. Equality in civil society could only be guaranteed by the equal submission of all to the general will. As Rousseau noted, in civil society dependence upon men could only be averted through law - and he spoke of the need '*to put the law in place of the individual, and to arm the general will with a real power that made it superior to every individual will.*'⁶² If the same standard were applied to family relationships - if law were to prevail within the family as it must within civil society, the family would cease to exist. Relationships between spouses, between parents and children, would have to be governed by law in the same way and to the same extent as relationships within civil society, that is by laws designed to ensure that all traces of personal dependence would be eradicated. It is well to recall that Rousseau, alone among early liberal theorists, recognized that only true substantive equality had the capacity to ensure that men might remain independent. Citizens must be secured against becoming poor, true necessities must never be taxed, for these are essential to

survival, but the taxes imposed upon those who have amassed superfluous goods may extend to all which they possess above the bare necessities of life.⁶³ In Rousseau's radical conception of equality, even the magistrates and others in positions of authority were to be respected for their wisdom and their virtue and their *avoidance* of the prerogatives of office.

Should Rousseau's radical conception of equality be applied within the family as within civil society, a conception, it must be remembered, which was designed to ensure that relationships of dependence could not arise, no enduring relationships between the sexes would exist. All relationships more enduring than casual matings engendered simply by sexual need are by their nature particular, reflect the need of the individual for a specific other. As Rousseau acknowledged in the 'Discourse on the Origin of Inequality', once men and women had become social, they learned to make comparisons between people, developed the need of a specific partner, and both love and jealousy inevitably followed.⁶⁴ What is critical here is not only the need of a specific partner, but its particularity, its specificity. Men and women desire to appear to one another as unique and particular individuals, not as ideals, nor as abstract and universal individuals. The need is of and for a specific other, not an idealized reflection of self. In such relationships each individual seeks recognition from the other for what he or she is, a unique individual who desires to be valued for his or her very particularity. Mutual dependence is inevitable, and it is this which, in the very beginnings of the social state, contributes to the full development of all the human passions, both for good and for ill.⁶⁵ How then, to reconcile natural man and social man?

As we saw earlier in this chapter, Rousseau's project is both complex and sophisticated. Woman is to remain social woman, indeed, she must become so fully social woman that she exists solely in relation to others, through their eyes as it were. If her need of others is fully social, it is yet devoid of the pernicious comparisons and the rampant egoism of social man. She lacks both self-love in the non-egoistic or natural sense, and self-love in the egoistic or social sense.⁶⁶ In a sense, woman must become fundamentally devoid of self, simply one element in an aggregate, a larger whole, deriving her identity and her existence from it.⁶⁷ If women were to be educated to absolute personal and economic self-sufficiency as

63 Rousseau, *The Social Contract*, *loc. cit.*, 279-282 and again p. 285-286.

64 Rousseau, *The Essential Rousseau*, *loc. cit.*, 178.

65 Cf. A. Skillen, 'Rousseau and the Fall of Social Man' in 60 *Philosophy* 121 (1985). Skillen quite correctly notes the centrality of love in Rousseau's thought and its problematical nature.

66 The distinction here is the well known distinction between *amour soi* and *amour propre*.

67 It is perhaps worth noting that Rousseau's ideal citizen is also but an element in a larger whole. As he says '*The citizen is but the numerator of a fraction, whose value depends on its denominator; his value depends upon the whole, that is, on the community.*' Rousseau, *Emile*, (Foxley translation), *loc. cit.*, 7.

men must be, come to exist for themselves alone, dependent upon things but never upon others, they would be unwilling/unable to relinquish this self-sufficiency and become solely for their husbands.⁶⁸ Man, on the other hand, must attempt to reconcile the natural and the social, must remain for himself alone, and yet become simultaneously the head of a family and a citizen, an equal member of a wider collective. Within the family, the conflict was resolved by the self-immolation of the wife, the absorption of her identity in that of her spouse.

How, then, is the conflict between natural man and social man to be resolved within the state? In the 'Discourse upon the Origins of Inequality' man's development as a social being was accompanied by increasing inequality, increasing competitiveness, increasing strife. As Rousseau notes,

*finally, consuming ambition . . . aroused in all men a vile inclination to harm one another . . . there was competition and rivalry on the one hand, opposition of interests on the other, and always the hidden desire to profit at the expense of others.*⁶⁹

Social man driven by private property and the need for the labours of others inevitably became embroiled in a war of all against all strongly reminiscent of Hobbes.⁷⁰ A social contract followed, also reminiscent of that in *Leviathan*, and about this Rousseau comments:

*Such was, or probably was, the origin of society and laws, which gave new fetters to the weak and new strength to the rich, permanently destroyed natural freedom, established the law of property and inequality forever, turned adroit usurpation into an irrevocable right, and for the advantage of a few ambitious men, subjected all others to unending work, servitude, and poverty.*⁷¹

While this was probably a reasonably accurate description of the France of his day, this was not the social contract Rousseau sought to define as the foundation of the just state. The social contract of the 'Discourse' originated out of civil inequality and entrenched it through law. Because it reflected only the particular interests of particular individuals, it must be illegitimate. In no sense might the parties to it be said to be equals. No true community of purpose existed between them. By contrast, in the social contract Rousseau envisioned, one whose terms demanded 'the complete surrender of each associate, with all his rights, to the whole community',⁷² in exchange for civil freedom and ownership (as opposed to bare possession) of property, the one feature which assured absolute civil reciprocity was the equality of the

⁶⁸ To some extent, of course, events have proved Rousseau right. As the education of women more closely resembles that of men, women are seeking to maintain economic independence.

⁶⁹ Rousseau, *The Essential Rousseau*, loc. cit., 183.

⁷⁰ *Ibid.*, 184.

⁷¹ *Ibid.*, 186.

⁷² *Ibid.*, 17.

surrender. Nothing might be withheld, and since each inevitably gained the same rights over others as he granted over himself, no man would have anything to gain from inequality. In their total dependence upon the general will, which epitomized the abstract interests of each individual, each would be secured against all possible dependence upon particular others.

Charvet describes the formulation of the general will thus:

*Each begins by expressing his private interest, which is his selfish desire for an arrangement . . . designed to give him as an individual an advantage over all others. By cancelling out the selfish element in the arrangements each proposes, we are left with an arrangement which gives no one the preference but treats all equally.*⁷³

Yet, if we take our particular interests to be, not simply selfish or egoistical interests, but interests which are uniquely our own, reflect our individuality and full particularity, it is difficult to see how the general will can be anything but an abstraction devoid of truly substantive content. Charvet suggests that

*this serves as a solution by ensuring that individuals can be related to each other in a community without becoming dependent on each other as particular individuals with particular systems of ends. Each is dependent on the other fundamentally only in respect of his abstract individual interest which is identical for each, so that he is related to another as a mere duplication of himself and his own interest.*⁷⁴

As citizens, equality merges into identity, and each, to the extent that he is dependent upon the general will remains dependent upon himself merely.⁷⁵ As particular individuals, no continuing relationship between these citizens appears possible, equality merging imperceptibly into a kind of sovereign isolation. As individuals, each pursues his own interests, endeavours to further his own ends, and is entitled to do so as long as he pursues them as does natural man, solely by reference to his own needs and without regard to the interests of others.

⁷³ Charvet, *loc. cit.*, 128. More generally see pp. 126-138.

⁷⁴ *Ibid.*, 138. This interpretation of the origin and role of the general will bears a strong resemblance to Rawls' original position, indeed the belief that rational shared interests can be identified suggests many shared assumptions. Dworkin's curious and provocative conception of the 'group's assumption' that its roles and rules are equally in the interests of all likewise displays substantial affinity with Rousseau's notion of the general will, although his account of equality of resources seems more closely allied to the utilitarian tradition. See the discussion of Dworkin's theory of associative obligations in Ch. 5 & 6, and his account of equality of resources in Ch. 3, 6, 10, & 11.

⁷⁵ Again, the parallel between Rousseau's conception of the formation of the general will and the 'original position' of Rawls is striking, particularly in the utter absence of a plurality of individuals at the level of ideal theory. The conflict between universal and particular is resolved by eliminating particularity.

Social man has been purged of the vices inherent in the social state by his surrender to the general will and his alienation of all that he has to the community. Natural man remains at liberty to pursue his own interests to the extent that his particular interests do not interfere with the interests of others. The outcome would appear to be a condition of alienation, of an *absence of sociability* in order that dependence upon particular others be averted, another form of the paradox mentioned earlier, that of the divided self. Yet Rousseau also places extraordinary demands upon citizens, ideally demands, not representation but full participation, love of country and of his duty. He insists that

*once public service ceases to be the main concern of the citizens and they prefer to serve with their purses rather than their persons, the state is already close to ruin.*⁷⁶ [Subsequently he comments that] *it is the cares of commerce and industry, avid pursuit of gain, softness, and love of comfort that change personal service into money. . . . In a truly free state, the citizens do everything with their own hands and nothing with money. Far from paying for exemption from their duties, they would pay to fulfil them in person. . . . In a well governed republic, everyone hurries to assemblies; under a bad government, no one likes to take a step to go to them,*⁷⁷ *. . . because everyone is completely absorbed in his own domestic concerns.*

The virtuous citizen must love his country and give it his total devotion.⁷⁸ Rousseau believed that conventional sentiments such as those engendered by the social contract could not be cultivated had a basis not been established in natural sentiments. Loyalty had its origin and basis in the experience of love.⁷⁹ Rousseau could not accept a Hobbesian outcome, a Sovereign outside the community of citizens and authorized by them to maintain order and security. Since such a contract inevitably deprived men of their independence and enslaved them, their consents could not bind. For Rousseau, the Sovereign was no more and no less than the community of citizens as a whole⁸⁰, indeed Rousseau describes the relationship between the individual and the state as one in which each citizen *'is under a double obligation:*

76 Rousseau, *The Essential Rousseau*, loc. cit., 78.

77 *Ibid.*

78 Rousseau, *Social Contract*, loc. cit., 264.

79 Thus, in *Emile*, Rousseau observed that *'the bonds of convention always develop from some natural attachment: that the love one has for his neighbours is the basis of his devotion to the state; that the heart is linked with the great fatherland through the little fatherland of the home. . .'* *Emile*, loc. cit., 133. What he did not acknowledge, although it follows, is that the basis of the love he extolled as the wellspring of civic virtue incorporates respect for the opinions of the loved one, and thus, inevitably, reciprocal dependence. Only if the 'love' involved is self-love (*amour soi*) can this be avoided, and this is, of course, what the education of Emile and Sophie is designed to foster. Rousseau's ideal community is, perhaps, a community of rational egoists.

80 I note here the similarity to Dworkin's curious and provocative conception of the 'community personified', the idea that a community can be faithful to its own principles which it can itself honour or dishonour, and that these principles must be distinguished from the conventional or popular morality of its members. Dworkin, *Law's Empire*, loc. cit., 168.

toward other individuals, as a member of the sovereign, and towards the sovereign as a member of the state.⁸¹ The loyalty of which he speaks emanates from within rather than being imposed from without; he seeks to create a community of equal citizens, not private individuals. If a contract is to bind separate individuals *who recognize no social ties* force is essential and enslavement inevitable. In the social contract as Rousseau perceived it individuals remained free precisely because they obeyed only themselves as members of the sovereign. It was this aspect of the social contract which required that men perceive the social contract as subjectively obligatory, as morally binding, and it was this which demanded a foundation in natural sentiments. What Rousseau is in fact suggesting is that if we do not first experience obligations and moral sentiments within the family we will lack the capacity to understand our relations within political community in moral terms. The alternative to moral community is slavery.⁸²

Even given Rousseau's thesis concerning the profound inter-relationship between the development of the social sentiments and the governance of the just republic, it is not immediately apparent how this devotion is to be realized. Charvet suggests that, for Rousseau, the illusion of love which we saw prevailed in the relationship between his ideal man and woman serves as the model for the relationship between the citizen and the state. He comments:

*The value of this love for the lover is the same as the value for the individual of his love of the moral good. The lover feels himself to be significantly related to another person without attending to that person's particularity, as the individual in his love of the moral good feels himself related to others but not as particulars. His self-exaltation in his love does not simply dispense him from paying, but requires him not to pay, attention to the particularity of his beloved, just as the individual's love of the moral good involved the denial of the relevance for him of the particularity of others.*⁸³

Even Rousseau acknowledged that the social sentiments he was desirous of cultivating normally brought dependence in their wake. Indeed, rather belatedly, Rousseau acknowledges the possibility of an attachment between tutor and pupil/father and child. After Emile reaches the age of sixteen or seventeen, and his sexual stirrings awake his sentiments, Rousseau

⁸¹ Rousseau, *The Essential Rousseau*, loc. cit., 18. Again, I note the parallel to Dworkin's theory of associative obligations, particularly his view that such obligations are uniquely owed to group members, that they are personal, and that they exist only where the group's practices show equal concern for all its members. Dworkin, *Law's Empire*, loc. cit., 199-201. Despite Rousseau's contractarian backdrop, his notion of the act of association as involving a reciprocal commitment and being essentially involuntary emphasizes the similarity, as does his view that the association at once ceases to bind should the mutuality vanish.

⁸² Cf. Rousseau's nebulous conception of a 'civil religion' grounded in sociability and demanding devotion to law and justice and duty. *The Essential Rousseau*, loc. cit., 113.

⁸³ Charvet, loc. cit., 114-115.

acknowledges that Emile may become attached to his tutor, and that this may create dependence. Yet he describes the ensuing attachment in a way which emphasizes the extent to which it is devoid of recognition, a perversion of the social. Initially, it

*will be [to] only those with whom he associates, people who think and feel like himself and have similar pains and pleasures, those in short whose obvious identity of nature with him increases his self-love. [Only later will he] succeed in comprehending his individual notions under the abstract idea of humanity and combining his personal affections with those that identify him with mankind.*⁸⁴

In these passages it is critical to note that Emile's attachment is not for the other, but ultimately only for the self, and it is this love of self (*amour soi*) which leads to his identification with mankind. Others come to exist for him and to be meaningful to him only to the extent that he perceives himself and his ends as mirrored by them. The problem of sociability has not been resolved by Rousseau's attempted synthesis. If sociability without dependence is possible only with those who mirror the self, whose systems of ends are as one's own, it lacks the capacity to provide a solution to the paradox of sociability as perceived by Rousseau, the situation which arose when man found it needful '*to show himself as different from what he actually was*'⁸⁵ in order to win the esteem and the assistance of others possessed of interests and ends of their own.

Rousseau's attempted resolution depends upon two critical assumptions. The first is that our true or authentic will is always for our own good, and it is that will to the good which finds ultimate expression in the general will. The second is that, given that our true or authentic will is always for our own good, and given that the good is necessarily the same for every individual (ie. our subjectively experienced freedom or power of self command), the good for every individual is identical.⁸⁶ As Rousseau observes '*we always will our own good, but we do not always see what it is. The people is never corrupted but it is often misled, and only then does it seem to will what is bad.*'⁸⁷ Rousseau envisions a community devoid of particularity, of individuality, but one in which each individual subjectively experiences himself as free and independent and wholly particular. The individual thus becomes merely an element in a larger aggregate, one whose individual will is identical to the general will. Only in

84 Rousseau, *Emile*, loc. cit., 105. In many ways this is strikingly similar to the account of moral development relied upon by Rawls and discussed in Ch. 4.

85 Rousseau, *The Essential Rousseau*, loc. cit., 183.

86 Cf. the much more recent account of Rawls. Rawls' conception of basic social goods as the basis for reasoning in the original position and his distinction between our rational decision to maximize access to these goods and our particular final ends is very close to the distinction Rousseau attempts to draw between our private wills as particular individuals and the general will.

87 Rousseau, *The Essential Rousseau*, loc. cit., 26-27, cf. 19.

this way can the individual attain moral freedom, *'for impulsion by appetite alone is slavery, and obedience to self-imposed law is freedom.'*⁸⁸

Within a family constituted as Rousseau envisions, this conflict does not arise. To the extent that Rousseau's ideal woman has become devoid of self, mirror for her husband's system of ends, Rousseau has provided a model for the devotion of the citizen to the state. In his ideal woman as in the citizen, devotion to duty must be absolute. Should, however, woman be educated as was man, educated to the full recognition and awareness of her own particularity and independence, develop fully her natural love of self, and with it her own system of ends, any relationship between man and woman would inevitably compromise the independence of both. Rousseau argued that if women were educated as were men, the greater the success of this project, the greater the ultimate subjugation of those so educated.⁸⁹ Why ought this be so? The answer is simple. To the extent that women came to be educated in the same way as men, and, in particular, educated to utter independence of mind and spirit, not even the illusion or shadow of a particular relationship between men and women would exist which did not reflect the corruption of the social state. To attain her favours, he would either be constrained to endeavour to persuade her to take an interest in him, to attempt to make himself appear in her eyes above all others, or, alternatively, must attempt to compel her compliance, bend her will to his. Either her tastes, her pleasures, will be imposed upon him⁹⁰, or his upon her. Rousseau seems wholly to have lacked the conception of the possibility of a fully social and particular relationship in which different interests and ends represent a source of enrichment and mutual enhancement, rather than a source of strife and ultimate dependence upon the will of another, and this, in turn, reflects the particular interpretation

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Ibid., 21. Cf. Rousseau's account of the virtuous man: 'He who can conquer his affections; for then he follows his reason, his conscience; he does his duty; he is his own master and nothing can turn him from the right way. So far you have had only the semblance of liberty, the precarious liberty of the slave who has not received his orders. Now is the time for real freedom; learn to be your own master; control your heart, my Emile, and you will be virtuous. . . . Would you live in wisdom and happiness, fix your heart on the beauty that is eternal; let your desires be limited by your position, let your duties take precedence of your wishes; extend the law of necessity into the region of morals; learn to lose what may be taken from you; learn to forsake all things at the command of virtue, to set yourself above the chances of life, to detach your heart before it is torn in pieces. . . . Then you will be happy in spite of fortune, and good in spite of your passions. You will find a pleasure that cannot be destroyed, even in the possession of the most fragile things; you will possess them, they will not possess you, and you will realise that the man who loses everything, only enjoys what he knows how to resign.' *Emile*, (Foxley translation), *loc. cit.*, 406-11.

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Rousseau, *Emile*, *loc. cit.*, 134.

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Cf., *ibid.*, 153.

given the ideals of independence and autonomy.⁹¹ Dependence upon things, recall, engendered no vices, dependence upon people engendered them all.

The danger, the problematic of dependence arose precisely because of man's capriciousness and his desire to set himself above his fellows, and it was for this reason that Emile was to experience only the opposition of things, and never of the human will.⁹² Once the opposition was perceived as coming from another like himself, he would see his satisfaction as dependent upon that other. His well being must not be defined in terms of his relationship to others, but independently of all such relationships.⁹³ If the relationship between man and woman is to be one between two such individuals, each must be fatally compromised, incapable of being either for himself or herself, or for another, for being for another amounted to enslavement. Only to the extent that the relationship between them was constructed in terms which ensured that this conflict could not arise, could family relationships exist. Were the relationship between man and woman to become identical to that between citizens, its particularity would vanish, and with it the basis for the development of the capacity for love in future generations. The dependence inherent in particular, loving relationships, the need for a specific other, was both essential and unacceptable. The privatized family was the resolution.

Rousseau saw in the absolute intellectual, moral, social and economic dependence of the wife a resolution of the paradox of sociability. Because he believed that '*the morals, the passions, the tastes, aye and the happiness of men*,'⁹⁴ depended upon women, women must be made wholly dependent upon men both for their survival and for their self-perception.

91 Contemporary egalitarians, of course, perceive this problem in very different terms. Rawls, for example, wholly displaces our particularity into the micro-communities of which the well ordered community is comprised. Within our private communities we pursue our final ends. Only in our deliberations concerning the form and shape of the just community are we mutually disinterested individuals reasoning upon the basis of our desire for shared and rationally identified 'social goods'. The principles chosen constrain the goals which may be pursued in private community, thus guarding against the danger that we will be compelled to abrogate our final ends because of the attitudes of others. Similarly, Dworkin distinguishes between choice-insensitive decisions, those which ideally ought to be decided upon the basis of shared rational principles (right answers) and choice-sensitive decisions, those which ideally ought to be determined upon the basis of community preferences. His preferred account of equality, equality of resources, defines equality as that set of outcomes which would follow if equal individuals who differed only in their preferences allocated resources equally among themselves, an egalitarian distribution being that distribution in which the individual's preferences were most fully satisfied, given the preferences of others. For both, rationally identified principles protect the individual against the danger that his own particularity will subject him to majoritarian prejudice and that he will be compelled to sacrifice his own beliefs and principles if he is to live in community with others.

92 Rousseau, *Emile*, loc. cit., 39.

93 Charvet, loc. cit., 63.

94 Rousseau, *Emile*, loc. cit., 135.

Dependence must replace equality. To the extent that she came to mirror his interests, his needs, his desires, he might please her simply by being for himself, having no need to create an appearance apart from reality. Her will could not conflict with his own, both because she had never been allowed to become for herself, and because she was destined to become in all matters her husband's disciple, and never his teacher. Mutual trust as it might come to exist between equals was impossible, because trust made one vulnerable to betrayal. Within the just state, the equality of submission to the general will ensured that no individual could gain ascendancy over the other, eradicated the possibility of conflicting wills.⁹⁵ Likewise, as Rousseau noted, the relationships of the members of the state amongst themselves ought be as limited as possible. He comments

*the second relation is that of the members among themselves, or with the entire body politic. This relation should be as small as possible in the first case and as great as possible in the second, so that each citizen will be completely independent of all the others and extremely dependent on the state. This is always done by the same means, since only the power of the state makes its members free.*⁹⁶

Clearly, this is utterly untenable with respect to the family, since it would cease to exist. If the law of the state were to run within the family as within the wider community, a law whose aim was to eradicate relationships of personal dependence and to substitute for them dependence on the state, and was empowered to regulate every aspect of human life, family relationships would be perceived as a threat to the existence and justice of the state, and must be eradicated. Yet this was far from Rousseau's intent, indeed, he criticized the Platonic solution precisely because it destroyed the family and substituted loyalty to the state.⁹⁷ The only tenable alternative involved radical privatisation of the family, a privatisation so all encompassing that its success depended upon the total eradication of individuality and will in the wife. Only such families had the capacity to rear the naturally virtuous citizens needed if a just civil society were to be within reach.

RECIPROCITY AND THE NEED FOR AUTHORITY

Underlying the arguments canvassed in the last section is the shadow of another, very different, argument. Social contract theory is based upon the reciprocity of equals, each ceding to an equal degree his natural freedom to the state, and each receiving in turn its guarantee that his civil rights and liberties and his property would be protected by its laws and decrees. To some extent, the reciprocity between citizens depends upon each individual's possessing the capacity to recognize himself in the position of the other, to perceive that the position taken

⁹⁵ See Rousseau, *The Essential Rousseau*, loc. cit., 27. Clearly, this is behind Rousseau's intense fear of partial associations.

⁹⁶ *Ibid.*, 47.

⁹⁷ Rousseau, *Emile*, loc. cit., 132-133.

must be as fair from the standpoint of the other as from his own. He must both perceive the other in himself and himself in the other. Reciprocity depends upon relationships of equality. Far more clearly than other early liberals, Rousseau recognized the role of economic, social and political equality in maintaining reciprocal relationships within civil society. Male and female educated as Rousseau's ideal demanded are incapable of reciprocity. Their relationship was to be that of complements, not equals. Thus, it is necessary to ask why Rousseau, having acknowledged that male and female were sufficiently similar in innate attributes to be capable of reciprocity, sought to ensure that this would not be realized.

In the ideal of rational independence shared by Rousseau and Kant, virtue and morality depended upon the capacity to detach oneself from all particular interests and attachments. It implied a willingness, at every moment, to transcend human feelings, whether of animal passion or of tender love and compassion, and adopt an objective and rational attitude of mind.⁹⁸ Yet this atmosphere, one of detachment and objective evaluation and of purely rational commitment, is ultimately dehumanizing, destructive of the naturally virtuous man Rousseau idealized, and, for this reason, incapable of providing a secure foundation for the virtuous state. It lacked the possibility of love. For Rousseau, it was not enough that men did what was right, they must want to do so naturally. Both mind and heart must act together. Rousseau's conception of brotherhood, of the fraternal bond, depends upon the existence of rational and dispassionate authority, upon that equality and commonality of submission to impersonal authority which guarantees that reciprocity will be maintained and which secures legally guaranteed rights and liberties. Only submission to the general will makes the virtues of citizens possible. Authority alone has the capacity to create an environment in which virtues such as sympathy, loyalty and, indeed, love can safely be given expression. Without the security born of the rule of law, he who ventures the expression of sympathy, compassion or loyalty, risks being taken advantage of, compelled to submit.

If authority is essential within the state, it is even more critical within the family. Recall the purpose for which the absolute authority of the general will was essential within the state, to ensure that each citizen remain, so far as possible, wholly independent of particular others and wholly dependent upon the state. In an intimate, ongoing relationship the condition precedent for this independence does not exist, it being the limitation of particular relationships among individuals in order that they should relate to one another solely as citizens, as free and equal members of the state. It follows that the existence of families ought necessarily compromise the independence of citizens and destroy the foundation of the just state. Rousseau could not, without destroying the logic of his own argument, accept this. The family, in particular the social sentiments of conjugal and paternal love, were to provide the basis for the love and loyalty owed to the state.

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Cf. Rousseau's account of the reasons that Emile, having fallen in love with Sophie (or more precisely the illusion which he has created of Sophie), must leave his promised bride. Rousseau, *Emile* (Foxley translation), *loc. cit.*, 406-12.

Rousseau must therefore reconcile the existence of an intimate, ongoing, and apparently wholly particular relationship with independence. Within the state, men were to experience one another exclusively as citizens, as members of the state. Their dependence upon law supplanted all particular dependencies. Within the family, as we have seen, this resolution was not possible. However, if the particular individualities of the adult individuals were to be supplanted by their social identities, their roles as husband and wife, and if no opposition of wills existed, if man and wife were one and he was that one, reconciliation seemed possible. His independence would remain uncompromised, enabling him to participate as citizen in the expression of the general will. The absolute authority of husband and father within the family, an authority vested in the roles it was essential that he fill, was to be, in its own way, as impersonal as the rule of the state. In obeying Emile, Sophie would obey herself precisely because she had no will, no interests, no basis for judgment apart from his. If authority within the household is secure, if the wife submits unquestioningly to the rule of her husband and devotes her life to her domestic duties, an illusion of love and warmth will become possible, and this is crucial. It is not the mind of the child which is of importance, but his natural instincts and feelings. These must be guided towards what is right, not by reason and argument, but by experience. The constant attention and supervision required if children are to be shielded from the follies and corruptions of society and allowed to learn naturally demands selfless devotion and patience. Guided always by the wisdom of her husband the virtuous wife provides the required atmosphere of industry, security and warmth.

Having denatured his ideal man and citizen and ensured that he would always have the capacity to step back from particular commitments and attachments, and, centrally, having proclaimed this capacity the very characteristic upon which the commonwealth depends if men are not to be enslaved, a haven in which man's natural feelings and passions may be safely expressed becomes essential. Only in this way might man avoid being enslaved by them and, therefore, by those who provided him with satisfaction for his need of them. Sophie, educated to ensure that she would be incapable of rational detachment, and trained from infancy to utter self-abnegation, the denial of self for the pleasures and the needs of others, provides that haven. Where Emile is rational, she is impulsive and affectionate. Where Emile is trained to reject the vagaries of fashion and the dictates of others, she devotes her life and her capabilities to being, for Emile, the concrete embodiment of his every desire. If man must, in order to be a citizen, subordinate passion to duty and conscience, woman must embody desire, but this must be confined to the household in order that her husband may be certain that her desire is for him alone. Only in this way may man be saved from the threat to his independence posed by his own sexuality.⁹⁹ The household becomes a miniature

commonwealth, one in which reason, embodied by the husband, rules desire and impulse, embodied by his wife.¹⁰⁰

While it is both easy and conventional to dismiss these aspects of Rousseau's thought as inconsistencies reflective of his misogyny, this does him a profound injustice. His account remains a sophisticated attempt to reconcile the conflict at the heart of rationalist thought. The effort to establish reason and morality as autonomous, as linked to freedom and to the universal in human nature not only denied the moral character of all affective ties,¹⁰¹ including those between parents and children, it denied that men and women are necessarily fully embodied beings, beings whose capacity for reason cannot be separated from their physical and biological nature. Family ties are heteronomous, depend both upon the bonds of blood and affection and, far more importantly, upon the socially constructed relationships of care and nurture. Like other social behaviour, caring behaviour is learned. In an ideal world, family relationships and ties would reflect the sort of mutual interdependence without which true independence never becomes possible. Such relationships threaten the vision of political society as a society of equals whose deepest and most profound loyalty is to a common ideal, precisely because family relationships offer an alternative vision of the meanings of freedom and independence and suggest competing ideals. They imply the existence of many different kinds of loyalties and of obligations which do not depend upon law for their force. If these other relationships and obligations are truly given force, the danger of conflict is ever present. Loyalty to other individuals, a loyalty acknowledged to have moral force, not simply emotional force, introduces the potential for a conflict of interests which, given Rousseau's ideal of independence, could only lead to continual strife and not that submission to the general will which ensured the just hegemony of civil society. The family must become merely another of the partial societies destined to defeat the generality of the general will. The ideal citizen must be ready to subordinate all, including his obligations to his wife and children and his life itself if need arise, to his duty to civil society.

While this model seems strange today, it was and is a theoretically workable model in many respects. So long as the Sophies of the world submit utterly to the men who rule them, and so long as the inherently unequal marital relationship is reinforced initially by the charm

¹⁰⁰ Cf. Charvet, *loc. cit.*, 106-111. Effectively, the intense conflict Rousseau perceives between reason and man's will to the good and his passions is displaced onto the relationship between man and woman. So long as reason remains in complete control, and passion exists to serve reason utterly, the conflict can be surmounted.

¹⁰¹ Ultimately, at least one contemporary egalitarian confronts the same conflict. Dworkin, 'The Place of Liberty', *loc. cit.*, 18-19, esp. n. 21. Dworkin explicitly characterizes moral constraints upon conduct as special features of personality and thus is able to deem them irrelevant to equality as he understands it, rather than locating such constraints in our circumstances. If the (subjective?) force of our moral obligations is ultimately no more than a special feature of the personality of some individuals, we can, should we realize the necessary detachment, abandon them. Cf. Chs. 5 & 6 and the discussion therein.

which draws Emile's desires to her and later by the paternal role, Emile's needs will bind him to Sophie as surely as her carefully inculcated submission, self-denial and dependence will bind her to him. Because, both as husband and as father, he acts solely in pursuit of his own interests, his independence will remain uncompromised. Only one inconsistency remains to suggest a flaw in this grand vision. In a society in which there are both masters and slaves, even if the slave is represented as a dutiful and obedient wife, independence surely remains illusory. Should Emile ever *perceive himself* as Sophie's master, his mastery over her is sufficient to enslave him simply because she has become necessary to him and it follows that he is dependent upon her.

Rousseau recognized this problem, and, indeed, addressed it in quite another context. As he observed '*this or that man may regard himself as the master of others, but he is more of a slave than they.*'¹⁰² How then may a man perceive himself as his wife's rightful lord and master, and yet preserve his independence? It would appear that the patriarchal role itself is sufficient to enslave him, that the social problem has not been resolved. We explored one resolution of this problem earlier in this chapter. To the extent that the wife possesses neither will nor needs of her own, lives solely for him, the question of patriarchal rule does not arise. Identity and mutuality have been attained. He need not perceive himself as her master precisely because there will be no shadow of conflict. To the extent that this is not attained, that the educational project is thwarted¹⁰³, Rousseau suggested that the alternative must be subjugation for the woman, and, by necessary implication, dependence for the man.¹⁰⁴ Such people, by their very unfreedom, seem unfitted for life under just laws, were more likely to contribute to the corruption of the state than its proper governance.¹⁰⁵

Yet Rousseau also emphasized that he sought, in the social contract, to offer an account of a legitimate civil order, '*taking men as they are and laws as they might be.*'¹⁰⁶ Given

102 Rousseau, *The Essential Rousseau*, loc. cit., 8.

103 That Rousseau recognizes this possibility is made clear by the fact that women are to be taught to submit uncomplainingly to wrongs and injustices at the hands of their husbands. *Ibid.*, 140.

104 *Ibid.*, 134. Effectively the only alternatives appear to be the eradication of the particularity of the wife and her subjugation by force. See Ch. 7 for an exploration of the connection between the marriage contract and slavery or voluntary servitude for life in the theories of Hobbes and Locke. Rousseau appears driven by precisely the same perception of the alternatives, however, given his (entirely correct) recognition that slavery corrupts master and slave alike, he sought a different resolution. Marriage as a slave contract was unacceptable to Rousseau precisely because of this recognition. Given the spectre of the conflict of wills, the educational project of *Emile* provided the only answer.

105 Rousseau, *The Essential Rousseau*, loc. cit., 38-40.

106 *Ibid.*, 8.

that he recognized the flaws in existing institutions¹⁰⁷ and given that the entire argument in *Emile* is intended to suggest the kind of education which would enable men to transcend the institutions surrounding them and recover their natural goodness, this passage is in the first instance somewhat mysterious. The answer may be that while Rousseau recognized that the actual particular individuals of his time were in fact enslaved by the institutions of civil society as they had come to exist, he also believed that through their participation in the community foreshadowed by the social contract, they yet might escape their chains. The relations which obtained within civil society, the untrammelled pursuit of self interest, the constant enhancement of needs, the dependence of the wealthy upon the labour of the poor, and of the poor upon whatever they might realize from their labour, nonetheless contain within them the potential reciprocity of equals. Horowitz suggests that the

*historical predicament that makes the social contract both possible and necessary is the existence of civil society. The existence of absolutely independent individuals, for whom the only grounds of obligation lie in their private wills, makes the contract necessary, because such individuals have an absolute need for protection from their equals. . . . Yet the contract is possible because these same individuals recognize their antagonists as their equals - none claims any a priori right to rule, but only to fight. Under these conditions social existence must assume the form of a contract. It must be a contract since an act of exchange is the only relation among absolutely independent individuals that is legitimate.*¹⁰⁸

If the relationship of husband and wife stands, as has been argued, altogether outside of civil society, is necessary to its continuation but no part of it, then the mutual dependencies and needs which arise within that context become almost irrelevant. The state exists to redress the ills to which civil society is heir, to ensure that the formal equality generated by relations of exchange is replaced by the substantive equality of citizens. The family stands outside both state and civil society. To the extent that the civil order is founded upon the willing alienation by each of all that he is and all that he possesses, and to the extent that the laws of the state ensure that dependencies do not arise among men, and men devote themselves to their civil duties, the relationship between the citizen and his privatized family will become marginal, unimportant to his happiness.¹⁰⁹

For Rousseau, participation in the civil state was essential to man's realization of his humanity, substituting justice for instinct, duty for impulse, and law for passion. Under the

¹⁰⁷ Eg. his attack upon the evils of the society of his time and the corruption of its people in 'Discourse on the Arts and Sciences'. *Ibid.*, 206 ff.

¹⁰⁸ Horowitz, *loc. cit.*, 183. More generally, see pp. 168-193.

¹⁰⁹ Rousseau, *The Essential Rousseau*, *loc. cit.*, 78-79. Effectively, what I am suggesting here is that Rousseau foreshadowed the 'separate spheres' ideology, envisioned a family setting in which man's duties as provider and citizen effectively occupied him to the exclusion of all else, while his wife devoted herself entirely to home and children.

social contract law might be substituted for strength, securing to each that which was his own and ensuring that productive relations among men might continue. It is for this reason that the apparent conflict between the existence of private particular relationships involving the loss of natural freedom and legal relationships intended to secure it is resolved once we realize that only men participate in civil society, enter reciprocal relationships of exchange secured by law. Within these reciprocal relationships, dependencies are intolerable, for they corrupt the generality of the laws and turn it to the service of partial interests. Outside of such relationships, while dependencies may be inevitable, they have no such ill effects. So long as relationships between men and women do not become a part of the network of bourgeois exchange relationships typifying civil society, so long as their 'life-worlds' remain apart, the mutual dependencies within them remain comparatively unimportant. It is only to the extent that women strive to realize reciprocal relationships with men that mutual dependencies threaten the social order and law must, at that point, regulate the household as it does civil society. This recognition in turn enables us to reconcile the suggestions in both the 'Discourse on the Origin of Inequality' and *Emile* that, ideally, the relationships between men and women reflect their natural freedom.¹¹⁰ This natural freedom is sustainable so long as the relationships involved remain those between complements, a marginal note to man's true role in life. *To the extent that relationships between men and women become relationships between equals predicated upon exchange, they are subject to the formal resolution of the social contract,*¹¹¹ a resolution implying the relegation of family relationships to the particular, self-interested relationships of civil society which, ideally will come to play only a minor role in the happiness of the individual. For Rousseau, ultimately, the relationship between husband and wife becomes marginal, essential to the creation of citizens, but unimportant to men as citizens. Because women remain in the state of nature and play no part in the exchange relationships of civil society, a man may be the master of his wife, in the sense that he embodies her interests and her needs, just as he may be the master of his domestic animals, but this will not enslave him because he need do nothing to sustain that relationship which does not emerge naturally from his *amour soi*.¹¹²

110 In the 'Discourse', Rousseau identifies mutual attachment and freedom as the only ties binding man and woman. See *ibid.*, 176. A passage with much the same general import appears in *Emile*, *loc. cit.*, 166 where Rousseau emphasizes that '*neither belongs to the other except by his or her own good will. Both must remain masters of their persons and their caresses.*'

111 As we saw in Ch. 6, when we attempted to develop an account of marriage and family life consistent with the basic premises of the theories of Rawls and Dworkin, we found it necessary to treat marriage as an exchange relationship among equals and, therefore, a relationship subject to the same formal constraints as the other exchange relationships of civil society.

112 Rousseau, *The Essential Rousseau*, *loc. cit.*, 8.

LIBERALISM, COMMUNITY AND THE FAMILY

INTRODUCTION

In the last two chapters we explored in some depth the interpretations of marriage and family life made available by early social contract theory. Despite the inegalitarian assumptions of these accounts, an attempt to explore them became critical given our recognition that any attempt to apply the egalitarian accounts of Rawls and Dworkin to family life led us inexorably into an account of marriage as akin to an ordinary civil exchange relationship among citizens, the precise consequence, it must be recalled, classical theories were structured to avert. Having examined the structure and assumptions of classic social contract theory, it is now time to explore the connections between classic theory and contemporary accounts. Our analysis of Rousseau is critical to this attempt because of the shadow his account of family life and of the idea of political community as a community of equal citizens has cast over the contemporary imagination.

ROUSSEAU AS PROPHET

Whatever Rousseau's inconsistencies his ideas continue to dominate our understandings and many of our social institutions. Until quite recently, Rousseau's image of the family persisted as an ideal representation of domestic bliss, and it is to Rousseau that we owe much of the contemporary reification of childhood. In many ways, his vision continues to exert substantial force over our understandings of family life. It came closest to realization, at least for the upper middle class, during the Victorian era and the early years of the Twentieth Century.¹ It is, however, impossible to reconcile with the quasi-egalitarian model of domestic relations now enshrined in law, that of the affective family.

Society has changed a great deal since Rousseau wrote. Today, the transmission of both wealth and power have been institutionalized. The new wealth, and the only true wealth attainable today, lies in the personal capacity to accumulate goods and entitlements through individual effort and accomplishment within the marketplace. The bundle of rights and future entitlements attached to employment has rightly been termed the new property.² Not only is

1 Cf. the material in Ch. 5.

2 The term, the new property was coined by Reich in 1963. See C. Reich, 'The New Property', 73 *Yale L.J.* (1963) 733. Weitzman, *loc. cit.*, 110-142. Dr. Weitzman uses the phrase 'career assets' to explicitly refer to such benefits as '*pension and retirement benefits, a license to practice a profession or trade, medical and hospital insurance, the goodwill of a business, and entitlements to company goods and services.*' See p. 110. In addition, the 'new property' comprises the education and training necessary to pursue many occupations and professions, security of tenure in employment and welfare rights, and, to an increasing extent, represents the single most significant asset available to most individuals.

the new property quintessentially individualistic in character, it is wholly personal, insusceptible of transmission to heirs and assigns. For this reason, the traditional liberal concern with securing the property of the individual and ensuring his freedom to transmit it to his heirs is gradually being rendered obsolete by social and economic change, even as the liberal emphasis upon the individual as the locus of entitlements is gradually being realized. Rousseau foreshadowed aspects of this as well. As we saw in the last chapter, the educational project of *Emile* was intended to create a man who would have the capabilities, wherever he found himself, to provide for his needs unaided. For *Emile*, the only 'property' of significance was that within himself, that to be found in his own developed capabilities or talents.³

Rousseau remains the most compelling of the early social contract theorists, and the one who most clearly established the parameters of the problem of human sociability. While all early liberal theorists were concerned with a political solution for the dangers which arose from competing interests, be the resolution seen in terms of Hobbesian absolutism, Lockean democracy, or Kantian rationalism, Rousseau identified this problem as one concerned, not only with market exchanges, but also with the *necessary pre-conditions* for creating a republican civic life. In this important respect he stands apart from other early social contract theorists. He both sought to devise a social contract theory which was a fundamentally political rather than an instrumental response to the problem of order, and, in his emphasis upon shared and rationally identifiable human interests foreshadowed the work of contemporary theorists such as Rawls. He remains attractive to those who envision a politics within which communal destinies are charted and pursued for that reason.⁴ The central problematic dominating both the political thought of Rousseau and his social and moral thought is simple. Given that individuals have different interests and different ends, given that they hold apparently different values and pursue different goals, how can we, as a political community, identify and pursue our common ends without subjecting some individuals to the dominion of others? It must be emphasized that contemporary theorists continue to confront all of the same issues which Rousseau attempted to address, whether the method employed is the clearly political (as opposed to natural) rights theory of Dworkin⁵, the social union of social unions of Rawls, the nihilistic abandonment of the political of Nozick, or, in a more optimistic vein, the untidy and conflictual pluralism of Walzer. Rousseau shares with Dworkin and Rawls the belief in a

³ Rousseau, *Emile* (Foxley translation), *loc. cit.*, 435-6.

⁴ Recently Dworkin has alluded to the connection between his own conception of the community personified and Rousseau's conception of the general will although he also emphasizes the 'confusion' into which Rousseau fell in ignoring the importance of the individual. See R. Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta L.R.* 324, 330.

⁵ Here, as well, Rousseau has cast a long shadow. His philosophical anthropology is constructed in a way which rules out any conception of 'natural rights'. There is no 'natural man' outside of culture and history capable of having rights. Cf. Horowitz, *loc. cit.* 36-49.

political resolution, the identification of criteria for judgment which will potentially attain the acknowledgment of all. In some ways, Rousseau's attempt to reconcile our social and conflictual nature with the possibility of a just and authentic political order remains both more sophisticated and more complex than its modern cousins. Rousseau recognized that the problem of sociability, the danger of dependence and of the subordination of the self to the goals and ends of others, permeated every aspect of social relations. In that respect, in his intuitive (and wholly correct) recognition that the boundary between the merely social and the truly political was fundamentally uncertain, and in his insistence upon taking man as he was, Rousseau's attempt, for all its flaws, is far bolder than the self-consciously political efforts of contemporary theorists.⁶

Whatever the inconsistencies in Rousseau's mature thought, his thought is meant to be taken as a whole, as a response to the problem of sociability as he perceived it, and it warrants respect for that reason. In his eyes, the social problem had its origins in the fact that, at the very outset of social life, individuals not only formed particular relationships with others, but also became subject to domination by those others. This arose, and here Rousseau was far more perceptive than his contemporaries, not merely from competition over scarce resources, but from our *social emotions*, the desire to win the esteem and the approbation of others. In this he was profoundly correct. Our greatest capacity for doing violence to our own natures and our own personalities - our real and potential uniqueness as individuals - arises both out of a felt need to be for others to the exclusion of being ourselves and out of our need for recognition by those others.⁷ Likewise, Rousseau's intuitive understanding that it may be impossible to extricate the social from the natural or innate in man, is of profound importance to feminist theory. Rousseau's reductive method in the 'Discourse on Inequality' is designed to capture the 'natural' in human nature and thus to emphasize that it is only in becoming social that people become recognizably human. Until this stage is attained, until we become participants in social life and creators of history, we remain merely potentially perfectible animals.⁸ Even if his philosophical anthropology is thought to be unpersuasive in its attempt to postulate a wholly pre-social state⁹, Rousseau, unlike his contemporaries, did recognize that

⁶ I acknowledge, of course, that contemporary theorists are diligently attempting to avoid his collapse into a form of totalitarianism, the eradication of individuality in pursuit of community. The question is whether they can do so while acknowledging women as persons. In Ch. 3, 5, 6, and 11 I argue that they cannot.

⁷ I should note in passing that, despite the definition of women as inherently for others and never for self in Rousseau's writings, I believe feminist scholarship has heretofore done Rousseau an injustice. To the extent that women have been unable to escape being for others and become for themselves as well, his observations of the plight we face are profound, even if he did not perceive it as such.

⁸ Horowitz, *loc. cit.*, 67-85.

⁹ But for a contrary view see C. Frayling and R. Wokler, 'From the Orang-utan to the Vampire: Towards an Anthropology of Rousseau' in R.A. Leigh (Ed.), *Rousseau After*

all those characteristics believed by his contemporaries to be 'natural' were cultural artifacts and the product of specific forms of social life.¹⁰ My concern, as was emphasized in the last chapter, is with the way in which the ideals of independence and autonomy he professed induced him to betray his own soundest instincts, both in his account of the education of women and the structure of family life and in the subversion of the civic republican ideal he sought to defend.

Rousseau began with a clear recognition that all those faculties and capabilities which seemed most typical of human beings were shaped and molded by experiences and the conditions of social life.¹¹ Thus, specifically human capabilities such as language, the use of tools, and rudimentary forms of communal organization were recognized as developed capabilities which arose out of our interaction with our physical and social environment. Rousseau suggests

*that men in the state of nature, having no kind of moral relations or recognized duties amongst themselves, could not have been either good or evil, and had neither virtues nor vices, unless we take these words in a physical sense and say that vices are qualities that may be detrimental to the individual's self-preservation, and virtues are qualities that may be favourable to it . . .*¹²

Only *within social life* could terms such as virtues and vices acquire meaning, duties and obligations arise, and emotions become more complex than biologically grounded needs and fears. It is important to recognize that this *does not* imply that moral relations depend upon attainment of the form of life specified in the 'Social Contract'. Rather, given the state to which social man had already *descended*, given the nature of the bourgeois society of his day, the substitution of universalistic moral relations for the kinship relationships of his golden age required both a return to the self-sufficient patriarchal family and the subsequent creation of an authentically republican civic life. These goals, at that historic moment, necessitated the social contract as the only form of just civic life attainable, and it was in that respect that he spoke of the social contract as substituting morality for instinct.¹³

Having identified the paradox of sociability, that it made possible both virtue and the beneficial passions and vice together with all the harmful passions including envy and the desire for self aggrandizement, Rousseau sought to identify a form of social life as most nearly

Two Hundred Years: Proceedings of the Cambridge Bicentennial Colloquium, Cambridge, Cambridge Univ. Press, 1982, 109.

10 See the detailed discussion of changes which accompanied the transition from 'natural' pre-social man to fully social man in Ch. 8 and the references cited therein.

11 Rousseau, *The Essential Rousseau*, loc. cit., 173-175.

12 *Ibid.*, 164.

13 *Ibid.*, 18-19.

natural, in that it came closest to allowing the virtues to flourish, but did not yet give full scope for the vices which attended emotional and intellectual development. Horowitz suggests that Rousseau's 'golden age' represents in fact a communal economy which is organized as a domestic system of production whose aim is the reproduction of the family unit.¹⁴ This form of communal organization was inevitably rendered obsolete by increasing specialization and the proliferation of needs. The social problem, then, was to recapture the solidarity and independence typical of this form of communal life, given that people could never return to it, to reconcile passion and virtue in such a way that neither was perverted. In private life, the problem was epitomized by the threat to independence and to solidarity posed by sexual passion and by love. In civil society, the problem was epitomized by conflicting interests and the desire of individuals to attain supremacy over others. Rousseau's solution to the problem posed by the 'Discourse' is the reconstruction of individual and family life foreshadowed by *Emile* and the civic union of these emotionally self-contained and self-sufficient families foreshadowed by the 'Social Contract'. In each the very particularity of the individual and of his system of needs threatened the attempted resolution and emphasized its fragility.

Just as competing interests could not be tolerated within the political realm, competing interests were also intolerable within the family, and for the same reason. Inevitably, in the struggle for ascendancy Rousseau believed attended bourgeois society¹⁵, men would be constrained to strive to appear as other than they were to gain the support and admiration of others, and this would leave them dependent upon those they sought to please. Within the family the political solution, the idea of total surrender, by each, to the whole community, was untenable. The political solution involved two critical assumptions. The first was that individuals might only pursue their private interests independently, and not as members of any larger group or faction, their non-political intercourse being as minimal as possible. The second was that, at the political level, their union was to be secured by an absolute identity of interests. These conditions were unsustainable within the family. Family relationships by their very nature were both intimate and particular. The sort of total alienation Rousseau conceived as the basis of the social contract seemed unrealizable. Yet unity of interests was even more critical within the family.¹⁶ The potential for conflict was greater, and the involvement of the passions more intense. Unity within the family must be attained in a different way. If the educational project of *Emile* succeeds, in ruling Sophie Emile rules himself, attains mastery over those characteristics of social man which might otherwise enslave him. Precisely in the same way, if the political project of the 'Social Contract' succeeds, men attain mastery over those interests and impulses which otherwise

14 Horowitz, *loc. cit.*, 96.

15 *Ibid.*, 8, especially the famous references to 'taking men as they are'.

16 Quite obviously, this lack of commonality must also corrupt the state, should women become citizens.

divide them and in so doing substitute unity for plurality so that the rule of the state becomes, identically for each, his rule over himself.¹⁷

If the ideal man and the ideal woman attain this unity of existence, their relationship will, at least superficially, be one mirroring their natural freedom. No conflict can or will arise between them. The competition for the recognition of others which allowed the man's sentiments to develop and which gave birth to discord and jealousy, and which Rousseau argued inevitably attended social life¹⁸, might be subverted. Once women and children became simply a mirror in which his legitimate interests and needs might be reflected, each man's interest in preserving his position within the family was equal to the real or potential interest of every other man, just as his interest in ensuring the preservation of his liberty and property was equal. The restrictions inherent in the social state would become identical for all.

TRACING THE CONNECTIONS: ROUSSEAU'S HOLD ON THE CONTEMPORARY IMAGINATION

Perhaps more than any other social contract theorist Rousseau recognized and expressed the paradox present at the birth of liberalism. If on the one hand, he glorified the individual, the 'natural man' of *Emile*, on the other *The Social Contract* came close to epitomizing absolute collectivism, a resolution of the problem of sociability attained by the eradication of the individual and his absorption by the collective. His oscillation between an individualism so absolute it isolated man altogether from human sociability and a collective existence so total and so profound that individuality was utterly sacrificed to the communal life has been explored through his conception of marriage and family life. The question he set himself to answer was this. How could individuals whose relations among themselves were fundamentally relationships of exchange, of instrumental reciprocity, form a community and, as yet, as individuals, remain free and independent?

Hobbesian absolutism was untenable, for in the Hobbesian resolution individuals gave themselves up entirely to a Sovereign outside themselves as individuals, reinstituting thereby relationships of subordination and dependence.¹⁹ Lockean idealism was equally untenable, for Lockean majority rule collapsed into what Rousseau termed '*the will of all*', a resolution which looked only to private interests and was merely the sum of the private wills prevailing within the community. Harking back to ideas of natural rights foundered upon recognition

¹⁷ See M. Canovan, 'Arendt, Rousseau, and Human Plurality in Politics' in 45 *The Journal of Politics* 286 (1983). Canovan emphasizes that Rousseau apparently believed that '*any citizen thinking rationally about these shared interests must come to the same conclusion as any other*'. See p. 291.

¹⁸ Rousseau, *The Essential Rousseau*, loc. cit., 178.

¹⁹ For Rousseau, at the moment at which the individual ruler of the state assumed sovereign power, became the author of the laws, the social pact was dissolved and the people were forced to obey but had no obligation to do so. Rousseau, *The Essential Rousseau*, loc. cit., 72.

that the natural in man could not be extricated from the social in man, from the linked ideas that man became human only through social relations, as a participant in history, and that different forms of social relations called up different characteristics in man.

Like other early social contract theorists, Rousseau was profoundly concerned with the spectre of an ever-increasing conflict of wills as self-interested individuals sought to secure those things they desired. Unlike other such theorists, he recognized that the conflict was also engendered by their desire to set themselves above others and that even their desires were historically created, not naturally established.²⁰ The family, and in particular, the relationship between men and women reproduced this problem in miniature. If the social problem could be resolved in miniature, within the family, it might seem as well that it might be resolved within the state. As was seen in Chapter 7, both the Hobbesian and the Lockean marriage contracts might legitimately be almost indistinguishable from quasi-slave contracts, formed by the enforced submission of the wife to her husband. This solution, like their political solutions, was, for Rousseau, unacceptable. If their political solutions left man enslaved, subject either to the autocratic will of an autonomous and absolute sovereign or the arbitrary and self-interested wills of a transitory majority of his fellow citizens, the conception of marriage as potentially nothing more than a slave contract left the wife in utter subjugation and the husband enslaved by his own authority. The alternative seemed an inevitable clash of wills, with husband and wife pursuing their own independent ends, each striving to appear as other than he or she was to attain dominion. The educational project of *Emile* was intended to bridge the chasm between the isolated independence of natural man and the need for fully human sociability if man was to become human and a creator of and participant in history. If the educational project succeeds, both Emile and Sophie remain subjectively independent in that both have conquered the passions which would otherwise enslave them. *Both are ruled absolutely by virtue and by their duty, by a law which they have imposed upon themselves.*

If Rousseau's link with other early social contract theorists lies, to a far greater extent, in a shared perception of the conflict inevitable as self-interested individuals pursued their private ends and sought to set themselves above others than in his attempted resolutions, it is through his attempted resolutions that he has cast a profound shadow over the contemporary imagination. Both Rawls and Dworkin attempt, in very different ways, to recapture something of Rousseau's conception of civic republicanism, the sense that political decisions are or ought to be taken by the people as such.²¹ Both seek to secure and establish the independence of

²⁰ The Lockean solution was equally unacceptable. Where individual self-interest prevailed and the members of the sovereign sought to vote their private or group interests rather than legislate in accord with the general will democracy was on its way to degenerating into mob rule. *Ibid.*, 73 See also p. 183 where Rousseau specifically identifies the proliferation of needs as contributing to man's subjection and dependence upon other men.

²¹ Dworkin, 'Equality, Democracy and Constitution', *loc. cit.*, 330.

private communities under an umbrella of shared principles, establish space in which our human capacity for sociability and connection may be explored although this space has extended well beyond the self-sufficient families Rousseau idealized.²² Neither, perhaps, recognizes as profoundly as did Rousseau, that to the extent that we do, in fact, endeavour to further our interests as we perceive them to the greatest extent possible, the potential for conflict and subordination permeates every aspect of human sociability.

I want to begin to draw together the threads of arguments presented earlier and to establish concretely the conceptual connections between Rousseau and contemporary theorists. Rawls, as is well known, posits the 'thin theory of the good' as a motivational assumption to guide reasoning in the original position. As discussed at length in earlier chapters²³, our preference for a greater rather than a lesser share of these social goods is identified as both rational and shared. Our actual share of these goods provides an 'objective' basis for comparison among different individuals. Several features of the original position and the account of our rational good are remarkably similar to Rousseau's general will. First, just as in the community foreshadowed by the social contract, the individual, at the level of ideal theory, becomes utterly indistinguishable from the collective. Second, the belief in a 'universal' and rationally identifiable set of shared interests carries within it the essential elements of Rousseau's conception of the general will. Given that these interests are rationally shared by all within the community, it follows that the principles derived from them must also be acknowledged by all. To the extent that the concrete laws needed to govern the state comply with the principles thus established our authentic interests are furthered by them. They have obligatory, not merely coercive, force.

Rawls, of course, lacks altogether Rousseau's fear of the destructive potential of competition and of partial societies within the state. Indeed, he affirms partial societies and emphasizes that it is within these partial societies that our capacity for sociability is to be explored. In this way, he attempts to both secure space in which our full capacity for sociability can be explored and to safeguard against any collapse into collectivism and tyranny. We explored the success of this manoeuvre earlier. In Chapter 6 I argued that, at least with respect to the family, it fails altogether. Given that the circumstances of justice apply within families, and given that the same features which are likely to corrupt our judgment more generally occur within families, and indeed, because of the involvement of the passions the conflict may be more absolute and less capable of resolution, the same standards ought to apply. For Rawls, as for Rousseau, unjust institutions are incapable of generating obligations. If Rawls' own standards are applied, many, perhaps most, families must be seen as profoundly

22 I think here of Rawls' conception of political community as a social union of social unions, and his analogy between this conception and an orchestra. Rawls, *A Theory of Justice*, *loc. cit.*, 523-4, n. 4.

23 See Ch. 3 & 6.

unjust, and the pressure towards collectivism reappears, the extension of law to every aspect of life and the eradication of that sphere of personal freedom believed essential.

For Rawls, of course, Rousseau's solution is unacceptable. His entire theoretical structure is intended to reconcile the idea of shared rational ends with individualism and independence. He explicitly limits his account of justice to 'the political' as narrowly defined. He assumes that even if some of the institutions comprising the basic structure are themselves unjust, the structure as a whole may be relatively just. He attempts to foreclose the possibility that the principles of justice will extend to the communities of which the social union is comprised by *assuming* (without argument) that all positions other than that of equal citizen and that in the distribution of income and wealth are *voluntarily* assumed. I argued earlier that these suppositions are devoid of any empirical foundation and that their collective effect is to render his account of distributive justice irrelevant to women. Without these assumptions, however, particularly given Rawls' principle of paternalism, full state intervention into the family appears inevitable.²⁴ Rawls has, in fact, offered no escape from the alternatives posed by early social contract theory.

If Rawls seeks to displace or decentre the conflict between the individual and the collective, Dworkin has confronted the legacy of Rousseau much more directly. His metaphorical construct of the 'community personified' owes, as he acknowledges, much to Rousseau's conception of the general will.²⁵ Like Rousseau, Dworkin recognizes that if the idea of the 'community personified' is to do the work required of it, provide the foundation for political obligations, it cannot be confined to the wider community of the state. Thus, in his account of associative obligations,²⁶ he attempts to ground all our obligations in social practices in which the members of the community recognize that their obligations are particular to the group, that they bind member to member, and that they reflect, not only concern for the well-being of all the members, but equal concern. Dworkin endeavours to forestall the slide into an absolute and monolithic collectivism by positing a distinction between

*a particular unit of responsibility, by which I mean the person or group to whose credit or discredit, achievement or failure, the action rebounds, and, second, a particular unit of judgment, by which I mean the person or group whose convictions about what is right or wrong are the appropriate ones for us to use in making that assessment.*²⁷

He argues further that, in our culture, *'the normal or usual unit of judgment for all actions is the*

²⁴ See Ch. 6.

²⁵ Dworkin, 'Equality, Democracy, and Constitution', *loc. cit.*, 330.

²⁶ For a complete discussion and detailed argumentation regarding this account see Ch. 5 & 6.

²⁷ Dworkin, 'Equality, Democracy, and Constitution', *loc. cit.*, 335.

*individual. . . . that [each individual] must be satisfied that [he or she is] in the end acting on convictions [he or she has] formed . . .*²⁸

This distinction between responsibility and judgment enables us to distinguish between two distinct forms of communal collective action.

*In the case of integrated collective action, while the shared attitudes of participants create a collective unit of responsibility, they do not create a collective unit of judgment: the unit of judgment remains thoroughly individual. In the case of monolithic action, both the unit of responsibility and the unit of judgment become collective.*²⁹

Political community, according to Dworkin, must be an integrated community, not a monolithic community. While, in political community, we accept collective responsibility we do not accept a collective unit of judgment. Dworkin argues that the fundamental principle is that '*in an integrated community the collective life cannot include moulding the judgments of its individual members as distinct from what they do*'.³⁰ Thus, at a minimum, each individual ought to consider himself or herself free to reflect critically upon the actions of the group and to challenge them. An integrated community must foster and encourage the capacity for critical judgment, not stifle it.³¹

Even if we accept Dworkin's notion of 'integrated community' as provocative and meaningful, questions must arise concerning some of the suppositions upon which it is based. As we saw in Ch. 5, the critical element in associative community was the idea that what mattered was the *group's assumption* that its roles and rules were equally in the interests of all. While this seems plausible in Dworkin's more recent examples, those of an orchestra and a football team, indeed, we might think it bizarre if the first violin asserted as a matter of right the desire to explore his or her capabilities on the flute, notions such as that of the group's assumption seem less plausible in other contexts, such as the family. One explanation may be found in the role our culture has given the family. As Dworkin recognizes, a primary function of the family lies in its transmission of cultural values to successive generations.³² Whereas the collective existence of an orchestra is fundamentally limited to its musical functions and, under normal circumstances, its members become part of an orchestra voluntarily and with their musical skills and capabilities for critical judgment fully developed, the same cannot be

28 *Ibid.*, 336.

29 *Ibid.*

30 *Ibid.*, 340, n. 13.

31 The educational project in *Emile* was, of course, intended to develop just such an individual, one who had the capacity to step back from every involvement, whether with individuals or possessions, and act upon the basis of what he believed to be right. See Ch. 8.

32 Dworkin, 'Liberal Community', *loc. cit.*, 481.

said of family members. None of us commence our personal experience of family as volunteers nor can it be said that the skills and capabilities of all family members for critical judgment are fully developed. Indeed, one might quite reasonably assume, as did Rousseau, that the concrete capabilities required for critical judgment are acquired, at least in part, within the family, given its role in moral training. Given that one fundamental cultural role of the family is to transmit ethical values, and given that the collective life of many (perhaps most) families emphasizes moulding the judgments as well as the actions of (at least some) family members, it seems reasonable to suggest that the family may well be a monolithic community rather than an integrated community.

Nothing would turn on this distinction, were it not for the role Dworkin assigns the 'group's assumptions' in determining whether or not particular communities qualify as genuine associative communities capable of generating obligations *inter se*. We would do well to recall that Rousseau's account of the education of Emile and Sophie could reasonably be interpreted as an educational project carefully designed to generate and sustain just such a group assumption. If it has been successful, both Emile and Sophie will genuinely assume that the roles and rules involved in family life are genuinely in the interests of all, that they demonstrate, not merely concern for each family member, but equal concern. They will attempt to reproduce these roles and rules in future generations, indeed perceive them as the foundation of a virtuous life. Yet, and absolutely centrally, a critical element in the education of Sophie was the deliberately inculcated absence of the capacity for critical judgment in Dworkin's sense. (The same may be true of the girls in Dworkin's example of a patriarchal family.) *That is, at least within some communities, the 'group's assumption' may incorporate beliefs concerning appropriate roles and rules governing individual conduct which are predicated upon an honest and sincere belief that certain forms of critical judgment are inconsistent with equal concern for some family members.* This danger, of course, is precisely why I insisted that any adequate postinterpretive justification for family practices in our culture must include a developed conception of equal respect, given the privacy and autonomy conventionally attributed to the family.

This returns us to the precise question we considered in earlier chapters. Dworkin wishes to insist that political community may constrain the actions of its members, but that it must simultaneously foster the capacity for critical judgment, that the community must remain the unit of responsibility but not the unit of judgment. His own example of a patriarchal family suggests that a critical distinction between political community and many of the smaller communities within it is that while political community ought to seek to foster and encourage critical reflection and judgment in respect of the actions and decisions of that community, many of the micro-communities within it are monolithic, seek to monopolize both action and judgment. Undeniably, one reason to ensure that political community remains integrated rather than monolithic is to make possible a pluralist state and to ensure respect for many basic values such as freedom of religion. Again, a critical distinction must be made. In our

culture the family is conventionally given wide-ranging authority over the education, the upbringing, and the conduct of children. If the exercise of critical judgment is deemed inappropriate for some family members while encouraged for others, if this distinction is a key element in the family's culture, the capacity for critical judgment may never flourish in some individuals. *I see little, if any, reason to assume that individuals who lack the developed capacity for and the opportunity to exercise critical judgment in some settings will, none the less, exercise it in others.*³³ The point I am making is simple. If, as seems reasonable, the capacity for critical judgment essential to ensure that an integrated community not collapse into a monolithic community is acquired in large part within the family, and if this is essential to an adequate conception of communal life, it becomes clear that the family as an association must be held to the same standards as political community. No justification exists for any attempt to exempt it.

Just as Rawls assumes that our sense of justice develops within our own families, out of our primary experiences, and then fails to go on to consider the conditions essential for a sense of justice to arise, Dworkin emphasizes the capacity for critical judgment, and more particularly, emphasizes that the civic republican ideal represents a worthy aspiration if we are careful to distinguish between communal responsibility and communal judgment, and fails to go on to consider the conditions essential if the capacity for critical judgment is to be a reality within the community. Both failures emphasize the arbitrary nature of the prevailing distinction between public and private and both become crucial when woman is located at the centre of discourse and justice for women becomes part of the critical agenda.

HUMAN INTERESTS AND THE DISTINCTION BETWEEN MORALITY AND ETHICS

Recently, Dworkin has made an interesting and provocative distinction between the volitional interests of the individual, those things the individual desires or wants without necessarily believing that he or she ought to want them or that life would be less meaningful if they were not desired, and the critical interests of the individual. Where our critical interests are at stake, we seek certain goals or ends because we believe a life without them is somehow impoverished.³⁴ Thus we can say that our own past life, or that of another, is a poorer life precisely because of a failure to recognize certain critical interests, for example, a regard for friendship or for meaningful work. Dworkin argues further that we have a *critical interest* in justice, that our lives are poorer in the critical sense if our community is unjust. He continues:

the criteria of a life good in the critical sense cannot be defined acontextually, as if the same standards held for all people in all stages of history. Someone lives well when he responds appropriately to his circumstances. The ethical question

³³ Rousseau's fear of partial communities, of a will which might be general with respect to a particular group, but partial and self-interested with respect to the whole seems relevant here.

³⁴ Dworkin, 'Liberal Community', *loc. cit.*, 484-85. It should be noted that Dworkin uses the term 'critical interests' in preference to the more conventional 'real interests' to avoid any suggestion that our volitional interests are somehow not real.

*is not how should human beings live, but how should someone in my position live? A great deal turns, therefore, on how my position is to be defined, and it seems compelling that justice should figure in the description. The ethical question becomes: what is a good life for someone entitled to the share of resources I am entitled to have?*³⁵

It is this sense of a worthy life that Dworkin intends his conception of integrated community to capture, and this interpretation of the civic republican ideal he regards as central.

Now Dworkin is surely right in recognizing that the criteria of a good life cannot be defined acontextually and in recognizing that the ethical question ultimately depends upon how the individual's position is defined, how, in short, she is situated. Yet this renders still more difficult his insistence that 'felt moral constraints' somehow belong to personality as that term is understood by equality of resources rather than to the circumstances of the individual.³⁶ Surely any given *woman* might well identify a profound critical interest both in ensuring that her children receive the care and nurturing they require and in sustaining her commitment to a challenging career, perhaps one in which she may ultimately make a substantial contribution to her community as a whole. If as Dworkin suggests, someone lives well when she responds appropriately to her circumstances,³⁷ and if, at least in part because of the structure of her community and its *assumptions* concerning her position as woman and mother, her critical interests are in large part incompatible, not only is her life impoverished, but also it is impoverished by her *circumstances*. It is her circumstances, her concrete position as socially and culturally defined (most particularly by the *assumptions* of the various associative communities of which she is a part) which constrain and limit the options open to her, not a feature of her personality. (The same is, of course, true of her husband, however, while his life may well be impoverished in the critical sense by his failure to participate fully in family life, within existing communities he is often enriched in the material sense.) To suggest that the 'felt moral constraints' involved are simply features of her personality, and for that reason irrelevant to equality as Dworkin understands it, seemingly trivializes the conception of critical interests, and this is even more fundamentally the case if we accept that a central element in the position of the individual is her entitlement to an equal share of resources. If her felt moral constraints must be understood simply as features of her personality which are irrelevant to her share of resources, and if her critical interest in '*a close relationship with [her]*

35 *Ibid.*, 503.

36 Dworkin, 'The Place of Liberty', *loc. cit.*, 19, esp. n. 21. Even our moral obligation to obey the law is nothing more or less than a felt moral constraint. For the purposes of equality of resources, law merely puts up the cost of the transactions it forbids.

37 Would Dworkin say, I wonder, that Sophie who had been deliberately deprived of the capacity for critical judgment, has lived an appropriate life given her circumstances, that she has lived as someone in her circumstances ought to live? How ought her position be defined?

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children³⁸ cannot be reconciled with her critical interest in 'challenging work'³⁹ outside the home, then her life overall is made poorer, diminished, counts as of lesser value than would otherwise be the case. The conflict becomes, I believe, even more acute when we acknowledge that she also has a critical interest in justice, and ought therefore ask herself what a good life would be for one who is entitled to the share of resources to which she is, as a citizen, entitled.

The difficulty in reconciling these elements, the distinction discussed earlier between morality and ethics, the idea, discussed fully in Chapter 6, that even our legal obligations are to be perceived for the purposes of equality of resources as threats putting up the cost of the actions they forbid, emphasize the subtlety of Dworkin's project overall. As we saw in earlier chapters, Dworkin has gone to great pains to develop an account of obligations which escapes contract as such and which may be applied to the wide variety of associations characteristic of our culture, ranging from families to nation states. His account of associative obligations grounds his arguments for law as integrity, providing the idea of the community personified needed if he is to argue that a political community has principles of its own to which it may be faithful or unfaithful. We noted in this and earlier chapters the profound similarity between this conception and Rousseau's provocative notion of the general will, and found in the idea of the group's assumption many of the same dangers posed by the notion of the general will. Dworkin attempts to avert this possibility by his distinction between integrity and justice. Dworkin's account of associative obligations and of law as integrity must be carefully distinguished from the theory of justice which he is developing. In a profound and subtle sense, both his account of the legal obligations implicit in law as integrity and his account of associative obligations more generally belong to what he now terms the domain of ethics.⁴⁰ The perceived obligations and constraints are those which would be subjectively perceived by an individual who sought to make his life valuable in the critical sense, an individual who was, in Rawls' sense, reasonable.

The bridge between law as integrity and equality of resources is to be found in the idea that a just community is one which strives to treat its citizens with equal concern.⁴¹ Whereas our associative obligations are, insofar as we perceive ourselves to be members of communities which meet the test for true communities, subjectively binding, they, and the communities to which they belong, have no role in Dworkin's account of equality of resources.

38 Dworkin, 'Liberal Community', *loc. cit.*, 484.

39 *Ibid.*

40 *Ibid.* Dworkin argues at p. 479 that ethics includes ideas about the sorts of lives which are valuable for individuals to lead, in the critical sense, while morality includes principles about how people should treat other people. His own example of an interest in a close relationship with out children as a significant critical interest emphasizes the difficulty of the distinction he wishes to sustain.

41 Our desire to pursue and realize justice, as a community, might be termed one of the critical interests of political community as such.

In equality of resources we are isolated, atomistic 'liberal' individuals, individuals who view law as a threat putting up the costs of the actions it forbids and whose only relationships with others are, ideally, exchange relationships. We are concerned with law's objective existence and its coercive power, not its subjectively binding force. Equality of resources is, to use Rawls' language, the domain of the rational. Were this not so, that sphere of moral independence and individual liberty Dworkin desires to affirm might well be extinguished. Ethics, one might say, belongs to community and to communal life, whilst morality (and ultimately justice) are wholly individual.

In Chapter 6 I argued that Dworkin's interpretive project, applied to the family, demanded at a minimum that the group assume that its practices manifested both equal concern and equal respect for every family member. I argued that if the family was to be a 'true community' it was essential that equality of resources form the basis for resource allocation within families and for the resolution of matrimonial disputes. This is necessitated both by the role of the family in the socialization of future generations and by the fact that the just state has no alternative but to regulate the family if it is to fulfil its obligations to individuals. We noted that political community characteristically relies on the family to serve a number of essential social roles, in socialization of future generations, in the care of vulnerable individuals, in resource distribution, and in moral training. As will be recalled, I argued for this proposition, not on the basis that the associative obligations characteristic of our account of the ideal family be enforced directly, but on the basis of the idea that to the extent that women's labour market participation is impaired by their conventionally assigned family roles and this renders them disproportionately vulnerable this situation exists because the system of baseline constraints characteristic of our culture and our legal system has given men this particular advantage for nothing in advance. I sought to locate the disadvantages faced by women firmly in their circumstances, rendering them relevant to equality of resources and publicly enforceable. Central to my argument is the thesis that the distinction between public and private characteristic of liberal theory cannot be sustained, that to the extent we attempt to do so we continue to deny women full personhood. In the concluding chapters I shall argue further that the distinction between morality and ethics drawn by Dworkin cannot be coherently sustained, that to the extent our conceptions of a life which is valuable in the critical sense involve others, it becomes essential to invoke principles concerning how those others ought to be treated.

GAMBLES, INVESTMENTS, AND THE STRUCTURE OF LIBERAL THEORY

In the last chapter we began to draw together some of the diverse threads of what has been a very lengthy argument. So doing, I believe, we have come very close to identifying the necessity, for liberal theory, of the preservation of a private realm. The only alternative, it would appear, is the full legalization of all aspects of the human life. As we saw in earlier chapters, the affirmation of marriage and family life as private both militated against the overt intervention of law into the domestic realm and permitted, indeed ensured, that law governing the family mirrored prevailing ideologies and norms and enforced them indirectly.

When we considered the resources contemporary egalitarian theory made available for the development of a coherent legal regime for family law, we recognized that no theoretically coherent justification existed for excluding the family from the realm to which justice is relevant. Likewise, when we attempted to use these resources to provide an egalitarian account of family law, we found that the emphasis upon equality, at least within this mode of discourse, drew us inevitably, if not to contract in the traditional sense, to an account in which obligations and responsibilities were spelled out and made concrete and enforced by the state, at least with regard to children and upon dissolution of marriage. With this understanding in place, and with enhanced sympathy, we returned to classic social contract theory in search of further insights. In the theories of Hobbes and Locke we encountered an oscillation between force and passion, recognized that their denial of moral standing to relationships outside of contract left them no alternative but to accept this oscillation or argue for full legalization of family life. In Rousseau, we encountered a sophisticated attempt to escape the draconian alternatives thus posed, and recognized that both his account of family life and his account of political community ultimately foundered because no alternative appeared to be available to an individualism so absolute it denied human sociability and a collectivism so profound it left no room for the individual. In the last chapter, we explored the profound debt modern theorists owe to Rousseau and the degree to which many of his perceptions continue to dominate contemporary understandings. We noted, in particular, that their attempt to recapture political community as fundamental communal reflected this debt and that the application of their accounts to the family suggested that they have not yet developed a viable resolution of the problem identified by Rousseau. Now it is time to consider the full implications of extending distributive justice to women and to the family.

Rawls and Dworkin have been notably silent concerning gender based inequalities, preferring (understandably, I believe) to focus attention upon inequalities arising from racial discrimination or moralistic attitudes concerning sexual preferences. Rawls, quite explicitly, identifies inequalities arising from gender roles as voluntarily assumed, as a consequence of choice, and is thus able to assume that women would constitute the least advantaged group for the purposes of the difference principle only where they were denied access to the basic

liberties.¹ Dworkin seems also to view such roles as chosen in his account of equality of resources.² Their theoretical perspectives incorporate a male norm, whether this is expressed in terms of status remaining constant for the whole of a human life³, or in terms of equality subsisting despite increasing inequality in 'bank account' wealth. Thus, while denial of access to occupations which are socially coded male would constitute an injustice because it could only arise from a morally arbitrary characteristic irrelevant to fitness, the economic and social consequences of a choice to subordinate career advancement to personal relationships or to the demands of parenting seems not to constitute an injustice because of its implicit voluntariness and irrespective of its long term impact upon social and economic equality.⁴

Within the accounts of distributive justice we have examined, taken as they stand, I believe that, given the profound interrelationship between women's private roles and their public inequality, a further possibility ought to be examined. Given existing legal regimes and existing social conditions, it is entirely plausible to characterize marriage and child bearing as a gamble for women and explore the consequences of such a view within the framework of equality of resources. Dworkin suggests that it is consistent with equality of resources that individuals make more or less successful gambles and that their resources reflect this.⁵

In a very real sense, marriage today is a gamble (for women) and the further decision taken by many women, that of subordinating their career options to their family responsibilities a further gamble. The magnitude of the gamble involved is reflected in contemporary divorce statistics. Such women have wagered their future security upon something profoundly fragile, human relationships. Their husbands have not gambled to the same extent, indeed, given the balance between risk and gain, it seems appropriate to suggest that they have invested in marriage, sought to maintain a relatively even balance between risk and gain. The economic stakes for men are comparatively low and they cannot be seen as having risked their future options for the sake of a present relationship. Women, regularly, do precisely that, particularly if they bear children. That is, women quite frequently make initial occupational choices, not simply upon the basis of their own talents and capabilities abstractly defined, but also upon the degree to which such choices are compatible with culturally assigned gender roles, and, when married, curtail their economic activities in order to fulfil

1 Rawls, *A Theory of Justice*, loc. cit., 99.

2 Dworkin, 'Equality of Resources', loc. cit., 304-306.

3 Women's status, after all, alters radically upon marriage.

4 Very different consequences, of course, follow if we simply disregard the public private distinction intrinsic in such theories and rigorously apply their public principles to the family. See Ch. 6, and further, Ch. 11.

5 *Ibid.*, 292-294. At p. 293 Dworkin describes option luck as a 'matter of how deliberate and calculated gambles turn out - whether someone gains or loses by accepting an isolated risk he or she should have anticipated and might have declined.'

their culturally defined family responsibilities. If, subsequently, the relationship ends, on one level they may be seen to have gambled and lost and, for this reason, be thought to have no legitimate complaint. Divorce surely qualifies as an isolated risk anyone considering marriage today ought to have anticipated and might have declined, particularly as the magnitude of the initial wager increases.

A question which arises is how one may distinguish between a gamble and an investment. Dworkin distinguishes between gambles and investments on the basis of willingness to compromise future security for the sake of enhanced future gain. An investment seeks to strike a relatively even balance between risk and gain, whereas a gamble is a decision which significantly compromises future security for the possibility of high stakes.⁶ Can we make sense of the language of risk and gain in the marital context, spell out the potential gains and, likewise, the magnitude of the risk? Quite clearly, the issues involved are difficult to translate into the 'objective' discourse of economics, however an attempt to do so is both revealing and important. Our earlier exploration of the idea of family as a social practice, and our attempt to construct an ideal account of family offers one account of the potential gains. We noted the human need for a realm of intimacy and affect, a place where our potential for sociability could be explored and extended and noted as well that, for many individuals, an important aspect of this sociability lay in the decision to raise a family.⁷ These features are surely, for both men and women, central among the benefits of married life. They sound, not in the language of economics or even instrumental rationality, but in lasting satisfaction and well-being. They form an important and indispensable dimension of that which Dworkin terms our 'critical interests'.⁸ While our critical interests are, according to Dworkin, indeed interests, or preferences, choices we make in constructing a life we find valuable, these particular preferences belong to the domain of ethics, of convictions about the sorts of lives individuals believe it is good for them to lead.⁹ Now it may well be that, for a substantial number of women, certain critical interests are of significant magnitude to induce them to risk their future economic security in order to realize their capacity for fostering and sustaining relationships to the greatest extent possible.¹⁰ In this sense, once the importance of our

6 *Ibid.*, 294. Using this means of differentiating gambles and investments, it seems reasonable to suggest that women gamble on marriage whereas men invest in it, a rather disheartening conclusion.

7 See Ch. 6.

8 Dworkin, 'Liberal Community, *loc. cit.*, 484-485. See also the discussion of this distinction in Ch. 9.

9 Dworkin distinguishes between ethics, which includes convictions about which sorts of lives are good or bad for individuals to lead, and morality, which is concerned with how individuals ought to treat others. *Ibid.*, 479, n. 1. I do not believe this distinction can be coherently sustained.

10 I note here the connection between what Dworkin terms our 'critical interests' and Gilligan's account of gender differences in moral reasoning. See the discussion of

critical interests is acknowledged, it may be said that, in marriage, many women gamble their future economic security on marriage because they hope thereby to maximize their capability for sustaining and enhancing human relationships. Men do not gamble in this way, nor are they culturally encouraged to risk their future economic security for the sake of their family relationships, indeed they are socially and culturally discouraged from attempting to do so.

If, leaving aside for the moment the quite reasonable possibility that women gamble on marriage while men invest in it,¹¹ we nonetheless look at marriage as an investment in the capabilities of another, another difficulty appears. Marriage can be objectively characterized both as an investment in the skills and capabilities of another, and (particularly for women) a gamble upon the enduring qualities of the relationship itself. It is for this reason that the value of the investment is difficult to consider in isolation. A wife's investment in the skills and capabilities of her husband may have been well chosen and capable of yielding substantial rewards and her gamble upon the enduring qualities of the relationship profoundly ill-considered.¹²

Dworkin's distinction between volitional interests and critical interests is revealing in this context. In a sense, those characteristics in which women may be said to invest, the future earning capability and career prospects of their husbands, represent volitional interests. While these interests are undeniably real, they are subjectively subordinated to the human relationships involved. The distinction between volitional interests and critical interests highlights the real and significant questions involved in equitable financial settlements on the dissolution of marriage. We can say either that a woman who has invested in the economic capabilities of her husband in preference to developing her economic capabilities to the full is entitled, whatever happens to the relationship, to a fair return on her investment, or that *'the possibility of loss was part of the life [she] chose - that it was the fair price of the possibility of gain.'* She could have chosen a safer life, curtailed the time and effort devoted to her family, and maximized the time and effort available for realizing her own economic potential. Had

these issues in Ch. 4 and, in particular, the argument there put that what is conventionally termed the priority of the right over the good (or, in the language now used by Dworkin, of morality over ethics) tracks and reinforces the distinction between public and private. Perhaps the real problem is that a coherent distinction cannot be sustained between, in Dworkin's terms, *'principles about how a person should treat other people'* and *'convictions about which kinds of lives are good or bad for a person to lead.'* *Ibid.*, 479, n. 1.

11 This is the consequence of what was earlier described as a web morality, at least in a cultural setting where the dominant form of moral reasoning is the morality of the ladder. To the extent that women perceive moral choices in the context of sustaining relationships and enabling them to continue rather than in terms of rights and principles, they gamble on those relationships even where they are unaware of that component in decision making.

12 This does, of course, become particularly problematic when we consider those whose marriages began under the former 'fault system' for divorce. For such couples, it may be proper to speak of investing in a relationship and to suggest that the change to the new no fault regime converted an investment into a gamble.

she been willing to forego '*any chance of the gains whose prospect induces others to gamble*'¹³ her long term prospects might well have been far brighter.

Situating human relationships in the discourse of investments and gambles emphasizes the significance of the difficulty we encountered earlier in our attempt to reconcile equality of resources and associative obligations.¹⁴ Earlier we noted that these accounts pulled us in different directions, a tension highlighted by Dworkin's characterization of felt moral constraints as belonging to the personality of the individual rather than to his or her circumstances. Working within the language of gambles and investments offers us yet another frame of reference in which to address this tension. If, as seems reasonable, it is characteristic of our culture that marriage and family relationships have very different significance for men and for women, and that dominant cultural paradigms encourage (perhaps compel) women to gamble on marriage while permitting (or compelling) men to invest in it, and if, as seems clear, these paradigms contribute significantly to women's economic disadvantage, a question arises as to how this ought to be addressed. In Chapter 6 we pursued the idea that the language of true opportunity costs might provide the answer. Here the language of true opportunity costs can be utilized to enable us to move deeper, to suggest that to the extent that our culture encourages women to gamble upon marriage while men invest in it, it does so simply because, as a group, men have *never* been required to pay the true costs of certain aspects of the lives they have chosen to lead while women are almost invariably required to do so. Perhaps the 'system of baseline constraints' supporting the distribution of goods and opportunities presently in place has, in fact, given men this particular advantage '*for nothing in advance*.'¹⁵ While this analysis of the situation seems to me to be persuasive, and to suggest that a government dedicated to equality of resources would be compelled to establish baseline constraints to ensure that costs would not be distorted in this way, this remains difficult to reconcile with the competing (and within Dworkin's framework, equally plausible) notion that the possibility of (even catastrophic) loss forms part of the price of the life many women choose, and of the gains inherent in it *if* their gamble pays off. Again, it seems that the language used pulls in different ways. The issue turns, I believe, upon the distinction Dworkin attempts to sustain between ethics and morality, and upon the idea that 'felt moral constraints' belong to the personality of an individual, not to his or her circumstances.¹⁶ Perhaps the

13 Dworkin, 'Equality of Resources', *loc. cit.*, 294.

14 See Ch. 6.

15 Dworkin, 'The Place of Liberty', *loc. cit.*, 31.

16 While I have, in these passages, retained the language used by Dworkin in his own work, it seems clear, at least if one attempts to interpret the body of his work in a way that preserves its claim to integrity, that 'felt moral constraints' ought to be termed 'felt ethical constraints' and that Dworkin situates such constraints as comprising part of the good life for individuals. It follows that both his conception of 'felt moral constraints' and his account of associative obligations belong to the domain of the good. They are fundamentally subjective and relativistic, belong to individual

tensions and apparent inconsistencies we have noted arise for a very specific reason, one which is to a large extent submerged in the language of felt moral constraints, true opportunity costs and gambles. Perhaps the language of true opportunity costs, of gambles and investments of which individuals are unaware, of moral constraints which are no more than features of personality, is simply inadequate to convey what is at stake. Does it make moral sense, for example, to suggest that marriage can be characterized as a *'deliberate and calculated gamble'* for women?¹⁷ One problem with this approach is that the character of what is risked (future economic security) and the character of the potential gain (the full realization of certain critical interests) are incommensurable - simply not sufficiently of the same order to make comparative analysis plausible. Another problem, of course, is that marriage is not subjectively perceived as a gamble by many women, at least at the point of entry into a relationship. Indeed, if, subjectively, women did in fact come to perceive marriage as a gamble in which women are culturally induced to risk their wholly tangible future security for intangible future gains, it seems likely that far more significant numbers of women would endeavour to avoid the risks involved, perhaps by bargaining prior to marriage, or by maintaining labour market participation and demanding that their partners share equally in domestic responsibilities. This pulls us back to the problem we noted in Chapter 6, the fact that the steps needed to minimize the risks move marriage inexorably towards a model predicated upon exchange relationships between independent and equal individuals. It seems, indeed, that the steps a rational individual would take to minimize her risks in marriage inevitably tend towards the precise itemization of obligations and concrete assessment of the risks involved together with the measures required to minimize these risks.

Perhaps we might do better if we sought to characterize what is involved as an insurance problem. Might we find it plausible to insist, for example, that those contemplating marriage purchase insurance to protect themselves against the economic consequences of divorce? Given contemporary statistics which suggest that roughly one-half of all marriages in the United States today will end in divorce¹⁸ and that at least thirty-five percent of Australian marriages will also end in divorce¹⁹ it seems implausible to characterize divorce as an insurance problem in the strict sense, one which arises when a *'small cost purchases reimbursement for an unlikely but serious loss.'*²⁰ While the loss involved is indeed serious, it hardly qualifies as unlikely, a fact which emphasizes that insurance in the ordinary sense would be prohibitively expensive, being a financially disadvantageous bet for insurance companies.

preferences rather than being, in any sense, compelled by principle. This, in turn, clarifies why so much turns upon the group's assumption.

17 Dworkin, 'Equality of Resources', *loc. cit.*, 293.

18 Weitzman, *loc. cit.*, xvii.

19 MacDonald, *loc. cit.*, 5.

20 Dworkin, 'Equality of Resources', *loc. cit.*, 318.

Indeed, given the number of women who, following dissolution of marriage, rely upon social welfare benefits, it would appear that the government is already acting as an involuntary insurer in this regard.

Dworkin also suggests that '*we may have paternalistic reasons for limiting how much any individual may risk*', at least with respect to certain unspecified gambles.²¹ While he does not, in his discussion of the distinction between investments and gambles, develop either the nature of those reasons or the instances in which he might deem paternalistic constraints appropriate, it may be worthwhile exploring the potential applicability of such ideas. Recently, Dworkin has identified two distinct forms of paternalism. He argues that

*volitional paternalism supposes that coercion can sometimes help people achieve what they already want to achieve, and is for that reason in their volitional interests. Critical paternalism supposes that coercion can sometimes provide people with lives that are better than the lives they now think good and coercion is therefore sometimes in their critical interests.*²²

If we make use of these brief remarks in the present context, an essential first step is to attempt to characterize what form of paternalism might be involved. A good example of volitional paternalism might well be a requirement that all employed individuals participate in superannuation schemes to provide for their future economic well-being, and this, of course, is gradually being realized in Australia. It seems reasonable to suppose that most women would acknowledge that a reasonable level of long range financial security is in their volitional interests (and those of their children). Thus, it might appear that compelling them to act so as to protect their long range financial interests could reasonably be interpreted as helping them to achieve what they already acknowledge to be in their volitional interests. Government might, therefore, be entitled to compel those planning to marry to ensure that they provided for their future economic well-being, whether by bargaining prior to entry into a relationship, by sustaining labour market participation and seeking to ensure that family responsibilities were equally shared, or even by purchasing insurance cover sufficient to neutralize the economic consequences of divorce. (That no contemporary government would find such a move politically feasible goes without saying.) Governments could, of course, act instead to radically limit the availability of divorce, perhaps restrict its availability to circumstances where no individual's long range volitional interests could be said to be adversely affected by it.²³ Yet this possibility highlights a further issue. It may be much more difficult than might at first appear to isolate volitional interests from critical interests in this context. It seems to me quite plausible that while many women might acknowledge that it would be in their volitional

21 *Ibid.*, 295.

22 Dworkin, 'Liberal Community', *loc. cit.*, 485.

23 It is worth noting that such a measure would effectively outlaw divorce where dependent children were involved or where husband and wife were not approximately equal.

interests to ensure that they provided for their future economic security prior to entry into marriage or long term relationships, many might insist that doing so would also tend to defeat certain of their critical interests. They might, that is, find the concrete and specific negotiation required negated their own conception of a life which was valuable in the critical sense, perhaps because it made a mockery of the trust and mutuality they hoped to find in marriage and family life. Similarly, because Dworkin quite properly acknowledges that '*personality is not fixed: people's convictions and preferences change and can be influenced or manipulated*',²⁴ any move to radically restrict divorce would seem to fail to show equal concern to those who no longer find given relationships to serve their critical interests even while it might equally reasonably be thought that tolerating pervasive inequality arising from socially constructed and enforced gender roles also fails to show equal concern. Dworkin emphasizes, after all, the central importance of '*freedom of personal, social, and intimate association*' to his account of equality, identifying these domains as among those in which law ought not intervene unless necessary to protect the rights of individuals.²⁵

Our journey through the discourse of gambles and investments has highlighted a number of discrete elements and enabled us to identify a number of issues much more concretely and in a language which, I believe, substantially clarifies what is at stake. First, in economic terms at least, it is entirely plausible to suggest that marriage represents a gamble for women and an investment for men. To the extent that conventional gender roles and the social structures supporting and reinforcing those roles encourage women to devote a substantial proportion of their time and energies to their homes and families, to the extent that these expectations are entrenched in market structures and reinforce the gendered character of the opportunities conventionally available to both men and women, women are structurally encouraged (and in some cases effectively compelled) to risk their future economic opportunities in order to fulfil their socially defined responsibility for fostering human relationships. The choices involved are structurally generated and reinforced. They are significant features of the contemporary landscape, define the context in which particular choices are made.

If we acknowledge that '*someone lives well when [she] responds appropriately to [her] circumstances*',²⁶ it may well follow that for many women responding appropriately to their circumstances mandates that they devote significantly more time and energy to their family responsibilities than to their labour market participation. If we have over time constructed a social environment which defines the circumstances of men and women in very different terms, if the *circumstances* of a majority of women include the demands of the ideology of

²⁴ Dworkin, 'The Place of Liberty', *loc. cit.*, 35.

²⁵ *Ibid.*

²⁶ Dworkin, 'Liberal Community', *loc. cit.*, 503.

motherhood while the *circumstances* of a majority of men include the demands of the breadwinner role, men and women are very differently situated and it follows that responding appropriately to their circumstances has a wildly different social meaning for men and women. It cannot be emphasized too strongly that these same circumstances cannot be isolated from their economic consequences. This in turn makes Dworkin's insistence that '*felt moral constraints . . . belong to personality*' rather than the circumstances of the individual conceptually bizarre.²⁷ If we accept these statements at face value, the conclusion follows that women are required to choose between responding appropriately to their circumstances, including the family responsibilities our cultural traditions assign them, and equality, while men are not required to make this particular choice. Just as Dworkin argues that when a society is substantially unjust in the way its resources are distributed (as is ours) '*people who are drawn to both the ideals - of personal projects and attachments on the one hand and equality of political concern on the other - are placed in a kind of ethical dilemma*',²⁸ because the necessity of compromise '*impairs the critical success of their lives*',²⁹ those women who attempt both to fulfil the ideals our social, cultural and legal traditions have insisted are appropriate for women and simultaneously ensure that their future economic well-being and options are not sacrificed are placed in a kind of ethical dilemma. The injustice, I would argue, arises not from the ethical dilemma itself (for surely all normal individuals confront and deal with ethical dilemmas) but from the fact that it is gendered. It arises, not from any special feature of personality, not from the tastes and ambitions of a particular individual, but from the circumstances in which the individual finds herself, circumstances which cannot be conceptually isolated from our social construction of gender. Those circumstances include, not simply existing legal constraints viewed as '*threats putting up the cost of the actions they forbid*'³⁰ but the felt moral constraints Dworkin consigns to personality, at least where these moral constraints have in the past, and continue in the present to be socially, economically, and politically constructed in ways which are significantly gendered. With respect to the responsibilities inherent in the social reproduction of future generations I would argue, *contra* Dworkin, that equality of resources either demands that we work towards a world in which these responsibilities are shared irrespective of gender or which ensures that to the extent they are not so shared, full compensation is available to those economically disadvantaged thereby. To the extent that such responsibilities are not today shared, and to the extent that women are significantly disadvantaged thereby, women's liberty is as significantly diminished as it would be by legal restrictions. While Dworkin insists that he wishes to confine his discussion of

27 Dworkin, 'The Place of Liberty', *loc. cit.*, 19, n. 21.

28 Dworkin, 'Liberal Community', *loc. cit.*, 503.

29 *Ibid.*, 504.

30 Dworkin, 'The Place of Liberty', *loc. cit.*, 19, n. 21.

liberty to negative liberty, that is, '*freedom from legal constraint*',³¹ that limitation either renders his account of equality irrelevant to women, or, in the alternative, destroys his attempt to insist that his conception of liberalism does not depend upon an atomistic conception of the individual. If the kind of felt moral constraints which inhibit the capacity of many women to compete in the labour market are simply features of personality so far as his theory of justice is concerned, women are implicitly encouraged to disregard these constraints to safeguard their long term economic welfare and to realize other goals. They are encouraged to regard themselves as atomistic individuals, and to make decisions and choices without regard to their relationships with others precisely because having regard to these relationships and the moral constraints which accompany them ensures, given existing social, economic and political structures, continuing economic and social inequality.

Significantly, contemporary egalitarian theorizing does not endeavour to disrupt prevailing social structures and modes of locating individuals within the social context to any significant extent and it is this feature which, more than any other, excludes women from its theoretical ambit. The assumption that inequality can be addressed without radically altering the structures and contexts which generate and reinforce it, including the family, suggests a failure to come to terms with the fact that culturally specific forms of inequality evolve as a part of culturally specific social, economic and political contexts, that the relationship is dynamic, not static. Much (not all) contemporary inequality has arisen, not as a consequence of morally arbitrary differences between individuals, but as a consequence of morally significant choices. A perfect example of this blindness is the fact that the egalitarian ambitions of contemporary liberalism are strictly limited to those factors deemed relevant to the status of individuals as citizens. Securing to each individual equal citizenship and a share in the benefits of social cooperation mark the limits of a political conception of justice. As citizens, we are to be regarded as free and equal moral persons, while as private individuals we remain doctors or plumbers or labourers, or, perhaps, the wives of doctors or labourers or, if things go badly, welfare recipients. Neither marriage and nor its dissolution have any significant impact upon male status relationships while both have a major impact upon the status of women. It is precisely this distinction which suggests that marriage represents a gamble for a woman and an investment for a man.

The increasing economic inequality of men and women even in a successful marriage highlights another fact, as noted in the last chapter. The nature and character of 'property' is again being transformed. While, in general, our legal traditions have shown a linear development away from conventions which fettered the alienation of property and towards a conception in which alienability is one of the hallmarks of property as such, the increasing importance of the new property suggests that this trend may be reversing itself. The new property is substantially inalienable, inseparable from the individual. As the legal disabilities

of married women in the area of property ownership and contractual ability have been eradicated, forms of property have evolved which perpetuate these disabilities in practical terms despite formal gender neutral standards. The inalienable and individualistic character of the new property serves to perpetuate the dependence of women and their exclusion from economic equality, given existing gender roles. In the broad sense, a century after the enactment of the *Married Women's Property Acts* property remains firmly in male control. Its nature has undergone significant changes, while patterns of allocation and control have, in a broad sense, remained unchanged.

ADD WOMAN AND STIR: EGALITARIAN IDEALS AND THE CAUSES OF DISADVANTAGE

LIBERAL THEORY AND THE CONSTRUCTION OF THE NON-POLITICAL FAMILY

In earlier chapters I have explored the liberal 'attitude' to the family and to women, a task made more difficult by the virtual absence of both in contemporary theory. I have sought to elucidate the liberal conception of the individual and contrast that conception with other, more particular characters inhabiting the contemporary social, economic and political landscape, characters such as the employee, the mother, the father, the husband and the wife. Classical liberal ideals were examined and an argument put that such ideals were concerned with the relationships between men as public persons, that relationships between men and women and family relationships were largely irrelevant to such theories. Under classical liberal social contract theory, be it Hobbesian, Lockean, or Rousseauian, male authority within the household was affirmed. Families were identified through their relationship to the male head of the household and he was entitled to expect the state to enforce his proprietary rights in respect of his family as elsewhere.

Contemporary egalitarian approaches to social justice and equality have also been examined. Notable features include their purported universality, the tacit assumption that the masculine is inclusive of the feminine, and their relegation of relationships within families, and therefore, of the material foundation for the inequality of women, to the non-political. It has been argued that their acceptance, indeed reinforcement, of the existing division between public and private, their assumption that gender roles are in some way voluntary or chosen, and their absolute disregard of the way in which women's private roles reinforce and sustain economic and social inequality collectively suggest that, even were their ideal theory proposals *as they stand* fully implemented by the state, because the male gender role characteristic of late capitalism would remain the norm, women would remain less than equal. Only when we rigorously and ruthlessly disregarded their attempt to confine their accounts to the political, narrowly defined, and insisted that the circumstances of justice applied within families as elsewhere, did woman become visible and the family relevant to distributive justice.¹ Equally significantly, when we did so, we realized that simply applying their principles to the dissolution of marriage was inadequate. Because of the presence of individuals within families who are unable to define and protect their own interests, and because the nature and structure of many marriages renders women disproportionately vulnerable and unable to defend their own interests, far more broadly based intervention seemed inevitable. In this chapter I shall explore the wider implications of any authentic commitment to distributive justice for women and examine the degree to which such a commitment can be reconciled with egalitarian theories.

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See Ch. 6.

In order to fully explore these wider issues, we must return to the way in which contemporary theory conceptualizes the sphere of the political and the issues which are subordinated or wholly disregarded in their accounts. When political relationships are defined as relationships '*within the basic structure of society, a structure of basic institutions we enter only by birth and exit only by death, . . . [a definition emphasizing that] political society is closed [and that] we do not, and indeed cannot, enter or leave it voluntarily . . .*' the state's role in constructing, ordering and legitimating those relationships which are subsequently characterized as private and non-political is obscured. Likewise, defining '*political power . . . [as] coercive power backed by the state's machinery for enforcing its laws*'² conceals the degree to which political power and social and economic power are coextensive. While political power is undeniably coercive, those who wield political power also wield social and economic power and have frequently invoked the machinery of the state to sustain their power, including that within the family. The line between formal and legitimate coercion and private coercive practices is often blurred. The state has played and continues to play a critical role in constructing and defining socially and legally appropriate relationships of dependence, dictates the terms upon which new families may be formed and unsuccessful relationships dissolved, and defines the parameters of appropriate economic and social relationships between family members. In this way, the power of the state has regularly been and continues to be marshalled to structure, reinforce and legitimate private relationships which are often profoundly inegalitarian.

THE EGALITARIAN CITIZEN, GENDER IDEOLOGY AND THE INEQUALITY OF WOMEN

Rawls describes the citizen as a free and equal moral person capable of being self supporting over a complete life. In a similar vein, Dworkin's model of equality of resources tacitly assumes labour market participation throughout adult life and explicitly notes that individuals whose 'bank account wealth' is diminished because they have consumed much expensive leisure none the less remain equal when equality is interpreted as equality over the entire human life. Common to both ideal theory accounts is the assumption that market participation is the norm, that the theoretical individual is unencumbered by responsibility for domestic labour and/or parenting, and that theoretically relevant inequality is the consequence of morally arbitrary characteristics or, in Dworkin's terms, 'brute luck'. Inequality which arises as a consequence of choices made 'voluntarily' by individuals becomes theoretically irrelevant, whether its irrelevance is signalled by Rawls' assumption that positions other than that of equal citizenship and that defined by the distribution of income and wealth are entered voluntarily,³ or by Dworkin's distinction between brute luck and option luck.⁴ While Rawls identifies the

² Rawls, 'The Domain of the Political and Overlapping Consensus', *loc. cit.*, 242.

³ Rawls, *A Theory of Justice*, *loc. cit.*, 96.

⁴ Dworkin, 'Equality of Resources', *loc. cit.*, 292-304.

monogamous family as part of the basic structure of society,⁵ and thus as part of the realm to which justice is relevant, his analysis makes it clear that his concern is justice between families rather than justice within families. The family is perceived as a black box, an approach analogous to the conventional economic treatment of the firm. As Rawls notes, the monogamous family along with other major social institutions plays a critical role in establishing the life prospects of citizens. Taken as a whole, institutions such as competitive markets, private property and the monogamous family determine our expectations in life and favour certain starting positions over others. As Rawls also notes, however, the second principle of justice '*only requires equal life prospects in all sectors of society for those similarly endowed and motivated*'.⁶ Given that families shape the aspirations of the children born to them, and given that, as Rawls acknowledges, '*the internal life and culture of the family influences, perhaps as much as anything else, a child's motivation and prospects*',⁷ his failure to consider the way in which gender roles learned within the family (and reinforced within the wider community) have shaped the motivation and prospects of children and differentiated the life prospects of children even within the same family strongly suggests the irrelevance of justice within families, an irrelevance made explicit in his recent work.⁸ In a very real sense, one reinforced by the suggestion that those in the original position view themselves as heads of family lines, what becomes relevant to justice is just relationships between families, rather than within them. The family remains opaque, viewed from the perspective of its head. In this way Rawls reveals his affinity to classic contract theorists such as Locke, Rousseau, Hobbes and Kant. The social contract, even in contemporary metaphorical form, signifies a contract between families, not individuals, and it is the heads of these families who are made present as the persons of theory.

Rawls, in fact, provides the groundwork for a theoretical justification for non-interference with the inequalities encouraged and reinforced by existing family forms. He argues in the context of illustrating how a hierarchical social structure incorporating a hereditary governing class might be interpreted as consistent with the difference principle that such would be justified

*if the attempt to eliminate these inequalities would so interfere with the social system and the operations of the economy that in the long run anyway the opportunities of the disadvantaged would be even more limited.*⁹

Clearly, the same formulation could be used to attempt to justify continued inequalities which

5 Rawls, *A Theory of Justice*, loc. cit., 7.

6 *Ibid.*, 301.

7 *Ibid.*

8 See the detailed analysis and discussion of these in Ch. 3.

9 Rawls, *A Theory of Justice*, loc. cit., 301.

operate to the disadvantage of women. All that is required is the claim, already conventional in countries such as Australia and the United States, that further socio-legal attempts to enhance equality for women will in the long term so disrupt the social system and the operation of the economy as to further reduce the opportunities already available to women. An argument of this general form would be relatively easy to develop, indeed, its premises are widespread in popular discourse.

Arguments remain current that the measures required to enhance women's general political, social, and economic position to the extent needed to maximize equality of opportunity to the greatest extent possible would in the long run significantly disrupt the social fabric of society as a whole and cripple the economy. Consider the measures necessary to ensure that women like men would be capable of being self-supporting (as that phrase is presently understood) over the whole of their lives. Adequate paid maternity leave, paid parenting leave for both men and women and adequate and affordable child care facilities would represent *minimal* public commitments to equality of fair opportunity. Increased flexibility in both workplace and schooling hours and in the social allocation of leisure would enable reconciliation of parenting responsibilities with career and advancement options to a far greater extent than is presently possible, as would the ability to alternate periods of full and part time employment and periods out of the workforce without the attendant loss of benefits and opportunities for advancement. To bridge the gap between the public guarantee of fair equality of opportunity and its social reality, the family and educational experiences of both boys and girls would require significant alteration. Fair equality of opportunity, rigorously implemented, would require that both men and women perceive themselves as equally committed to domestic labour and parenting, just as both would also perceive themselves as equally committed to market activities. A social change of this magnitude requires a revolution in prevailing values and attitudes. It is in no sense a value neutral exercise but one which must ultimately, to the extent that it was successful, impact profoundly upon beliefs concerning appropriate roles for men and women, both within the family and within what is now thought of as the public sphere. While gender equality would not, of itself, require the abolition of the family as Rawls fears¹⁰, it would undoubtedly require its reimagination and restructuring upon an egalitarian basis, with both the benefits and burdens of cooperation within it fairly shared in all spheres. Already, even given the modest reforms currently in place, many argue that enhanced employment participation by women has contributed to the

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Rawls notes that '*even in a well-ordered society . . . the family may be a barrier to equal chances between individuals*' and subsequently comments that '*even when fair opportunity . . . is satisfied, the family will lead to unequal chances between individuals*'. See *A Theory of Justice*, loc. cit., 301, 511. These passages, taken in context, refer to the fact that even among families in the same sector of society families will shape their children's aspirations differentially and thus, in different families, similarly endowed children are likely to be differentiated by their motivation and aspirations. Rawls does not in these passages recognize that even within the same family children are likely to differ in aspiration and motivation and that very often these differences are shaped by gender roles.

increasing instability of the family, that protection for women and children against violence in the home and the funding of facilities to enable the victims of family violence to escape violent relationships are destructive of family relationships and stability. Likewise, arguments are current that the increasing prevalence of working mothers is destructive of the stability of the social fabric and leads to increased anti-social activity by young people and the breakdown of stable family relationships. Similarly, arguments on economic grounds can be and are being mounted against measures essential to facilitate workplace access by women. It remains more practical (and perhaps more 'efficient') for business to structure opportunities along conventional lines. Rawls' theory provides substantial philosophical support for such structuring, given his stated assumption that positions other than those of equal citizenship and relative economic advantage are voluntarily assumed and thus need not be considered.¹¹ Given that many, perhaps most, women cannot be described as '*economically independent and self-supporting members of society over a complete life*',¹² and given that this is a function of their traditional responsibility for domestic labour and parenting and their consequent need to seek employment options which are sufficiently flexible to allow them to sustain a double shift, Rawls' citizen seemingly has only the most marginal connection to the realities of women's lives.

By perceiving the family through the eyes of the head of the family line, Rawls obliterates the importance of justice within families as well as among families. Likewise, this perspective treats the family as a unity of interests represented by its head, again displaying his affinity with classic theorists. The costs of household labour and parenting, the differential allocation of resources within families, and the power differentials which accompany this allocation of resources are thereby located beyond or outside of analysis. While Rawls, like Rousseau, identifies the family as the foundation of the just state and the fundamental source of moral training, including the development of a sense of justice,¹³ he also assumes that families are, in the ordinary course of events, themselves just.¹⁴ At no time does he consider what a just family might look like or how the benefits and burdens of cooperation might be allocated within it if justice was to become a lived reality. Yet, if families are not in themselves just, it is difficult to understand how children can be expected to develop a sense of justice within them. It is not enough to assume that for the most part families are just, we must have

11 *Ibid.*, 96.

12 Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 268.

13 Rawls emphasizes the role of the family as the fundamental school of justice in *A Theory of Justice*, *loc. cit.*, 462-468.

14 *Ibid.*, 490. In discussing the principles of moral psychology Rawls begins '*given that family institutions are just. . .*'

some understanding of precisely what that might mean, of the standards which apply.¹⁵ If, as Rawls initially appeared to suggest, the family forms part of the basic structure of society, it would seem that families ought to conform with the principles set out for other aspects of the basic structure. This possibility is expressly disavowed by his relegation of the personal and the familial to the nonpolitical, and by his insistence that the standards appropriate to the basic structure need not apply to domains such as the familial and the personal.¹⁶

Significantly, in discussing the role of the family in inculcating the moral sentiments Rawls abandons his ostensibly gender neutral language and emphasizes the role of the family in teaching the '*virtues of a good son or a good daughter*'.¹⁷ The fact that, in the context of family life and the role of the family in fostering a sense of justice as a necessary foundation for the just community, Rawls abandons both his usual practice of using the masculine as universal and inclusive of the feminine and his otherwise gender neutral use of the word children suggests that the virtues of a good son and those of a good daughter are, at least in some respects, distinct.¹⁸ His use of the disjunctive reinforces this perception. Similarly, he subsequently refers to the social ideals associated with various adult statuses and occupations, such as those giving content to the various conceptions of the duties of a good husband or wife, and suggests that learning to negotiate these and other increasingly complex social roles leads naturally to a morality of principles and to the capacity to act from a sense of justice.¹⁹ This,

15 Okin has developed similar ideas both in S.M. Okin, 'Reason and Feeling in Thinking About Justice', 99 *Ethics* (1989) 229 and S.M. Okin, *Justice, Gender and the Family*, New York, Basic Books, 1989. Okin, however, concludes that Rawls' theory can be amended to address these issues without altering its basic character whereas I conclude that so long as Rawls confines his theoretical ambitions to the development of a purely political account which does not rely upon any wider moral theory and whose ruling ideal is tolerance he cannot consistently address these issues. To the extent that Rawls' theory is acknowledged to apply to family life, state intervention becomes morally mandatory and marriage is assimilated to the ordinary exchange relationships of civil society. See Ch. 6.

16 See Ch. 6 for a sustained, and I believe successful, attempt to extend Rawls' account of justice to the family.

17 Rawls, *A Theory of Justice*, *loc. cit.*, 467.

18 Rawls earlier departed from gender neutral language in discussing the requirements of intergenerational justice in terms of a father justifying the selection of the principle of equal liberty to his son. *Ibid.*, 208-9.

19 Contemporary psychological evidence suggests that Rawls is mistaken in this. While, indeed, a majority of men do, in fact, reason upon the basis of a morality of principles, a substantial number of women never move beyond what is characterized as the morality of association. Kohlberg has suggested that this is a consequence of women's familial roles and their association with those roles. Another way of putting this is to suggest that if we take as given Rawls' account of the development of a sense of justice, we must also, and crucially, recognize that while men may well develop a sense of 'justice' negotiating these roles, women fail to do so. It seems reasonable to suggest that this difference emphasizes the degree to which existing families are both gendered and unjust. See Kohlberg, Levine, & Hewer, *loc. cit.*, 122.

however, can only be the case if such associations and the ideal descriptions of the statuses associated with them are themselves just. If they are not, it is profoundly unlikely that a sense of justice will develop within them.

Herein lies the central problem for theorists such as Rawls and Dworkin. For both, institutions such as the family play an important if underdeveloped theoretical role, for Rawls as the fundamental source of the moral training which makes possible the development of a sense of justice, and for Dworkin as the ideal theory model for an account of associative obligations. Neither, despite the theoretical weight carried by the family, attempts to reconcile family roles with his account of distributive justice. If our historic practices of family and the roles associated with them met, as a rule, the demands of justice, this could be deemed to be no more than an unfortunate and inadvertent oversight. Given that our existing and historic practices of family cannot be shown to be just, given that rights and obligations have routinely been differentiated upon the basis of morally arbitrary characteristics such as biological sex, given that women (and children) have until very recently been unable to obtain protection from and redress for violence against their persons from other family members, and given that the benefits and burdens of social cooperation are conventionally unequally distributed within families, the situation is very different.

In earlier chapters, we examined the accounts of distributive justice offered by Rawls and Dworkin, and attempted to reconcile those accounts with generally accepted biological and social facts about human societies. Such basic facts included the prolonged neoteny of the human species, the fact that some form of family group appears universal in human societies, and the fact that the sexual division of labour has, albeit in various forms, represented an enduring feature of human societies.²⁰ Facts such as these, given the structure of Rawls' original position, must be among those available to the parties, however, nothing in either Rawls' account of basic social needs or his two principles of justice acknowledges either such enduring features of human societies or their distributive consequences. Whether this particular lack arises out of inattention or conscious choice, Rawls' heads of family lines are explicitly analogized to fathers making choices on behalf of sons who will one day themselves become heads of family lines.²¹ Although the monogamous family²² is acknowledged to form part of the basic structure its internal distributive consequences are ignored.

20 See generally Ch. 3.

21 In discussing the intergenerational aspects of justice Rawls comments that '*were a father, . . . to assert that he would accept the principle of equal liberty, a son could not object that were he (the father) to do so he would be neglecting his (the son's) interests.*' *A Theory of Justice*, loc. cit., 208.

22 *Ibid.*, 7. I note that, while the monogamous family is both the social and legal norm in contemporary societies such as Britain, Australia and the United States, even within such societies it coexists to a greater or lesser extent with other family forms, and these include both serial polygamy and openly polygamous forms.

Similarly Dworkin, in developing his account of equality of resources, explicitly avoids both intergenerational considerations²³ and any mention of the distributive consequences of family life.²⁴ Rather, he is concerned

*to distinguish fair from unfair differences in wealth generated by differences in occupation. Unfair differences are those traceable to genetic luck, to talents that make some people prosperous but are denied to others who would exploit them to the full if they had them.*²⁵ [Emphasis mine.]

It apparently follows that differences in wealth which arise from factors other than genetic luck or handicaps are not unfair. The field of unfair differences in wealth is limited by two distinct riders, the first identifying unfair differences as those which arise as a consequence of genetic luck, and the second limiting them to differences which persist despite the willingness of the individual to exploit existing talents to the full. Yet many, perhaps most, of the disadvantages peculiar to women are not directly traceable to genetic luck, unless, of course, one is prepared to accept that being biologically female represents bad genetic luck, an irrational position. Rather, they arise as a consequence of our social construction of the female gender role, in that women's culturally assigned responsibility for parenting and household labour limits their capability to exploit any other talents they possess to the full. What is lacking is the explicit recognition that one profound source of disadvantage is concealed in the phrase 'occupation housewife', yet it would appear that housewives are irrelevant at the level of ideal theory. If, as seems likely, the social attitudes implicit in prevailing gender roles reflect underlying prejudices which, because of the pervasiveness of gender roles, have gone and continue to go unquestioned, it becomes essential to question and deconstruct them and this may be more difficult than it appears. Some of us, perhaps, can imagine a social world in which race is irrelevant. Imagining a social world in which gender is irrelevant may be more difficult, in part because gender and the roles and normative structures associated with it permeate every aspect of our lives, are fundamental to individual identity.

23 Dworkin relegates intergenerational considerations to a footnote in the development of his account of distributive justice. See 'Equality of Resources', *loc. cit.*, 312-313, n. 9.

24 His nearest approach to discussion of the family in the context of distributive justice occurs in an analysis of the marginal utility of money and the reasons why individuals purchase insurance. He comments that '*if the loss of my house would be more than nine times as serious as the loss of \$6000 (because, for example, I could not find or borrow enough money to build a suitable house, my marriage would dissolve, and my children become delinquent) then it is worth my while to buy the insurance, though it is a financially disadvantageous bet.*' *Ibid.*, 318. It does not, I believe, go too far to suggest that implicit in this account are conventional assumptions concerning the 'breadwinner' role including the entitlement of the breadwinner to make and carry out significant family decisions.

25 *Ibid.*, 314.

If the structural assumptions of egalitarian theory are taken as given, how ought the law address the nested issues of the inequality of women and family relationships? I have argued that for both Rawls and Dworkin the family is relegated to the private sphere, to that part of life where individuals realize for themselves ways of life which they find good. As Dworkin notes, '*freedom of choice in matters touching central or important aspects of an agent's personal life, like employment, family arrangements, sexual privacy, and medical treatment*' is crucial.²⁶ Given this, it follows that the law ought, so far as is possible, remain neutral among the varied ways in which family life may be negotiated and realized, unless individual practices of family are such as to deprive family members or outsiders of rights to which they would otherwise be entitled simply as citizens. Rawls suggests that neutrality as an aim of political liberalism ought to mean that the state should be committed to securing equal opportunity for citizens to adopt any permissible conception of the good and that it ought not take any steps intended to favour any permissible comprehensive moral stance above any other.²⁷ As a working definition of neutrality of aim I believe it likely that this would be acceptable to most egalitarians, particularly when coupled with basic presupposition of Rawls' form of political liberalism, that the ambition of political liberalism is to seek the common ground implicit in the public political culture and utilize this common ground in building and securing an overlapping consensus.

EXIT AND VOICE: EGALITARIAN OPTIONS FOR FAMILY LAW

What might this mean in the context of legal regulation of the family? Two basic historic models of family law have existed in the recent past. The model which prevailed during the first two thirds to three quarters of this century defined marriage as the contractual formalization of specific traditional gender roles and emphasized the obligations inherent in these roles. Exit was formally possible only where a serious breach of a specified type occurred and where the party seeking dissolution had neither departed from the parameters of his or her assigned role nor condoned the actions of the guilty party. The capacity to threaten exit as a means of making oneself heard within a relationship was itself gender linked, the exit option initially being legally more readily available to men. Those individuals who sought married status signified thereby their acceptance of the obligations imposed and their relationship was legally presumed to have been conducted upon this basis. The sole available remedy for deviation from these roles was judicial separation or divorce. Individual choice or preference was irrelevant except at the point of entry to the marital relationship and in determination of whether or not to exercise the option of exit, given that a legally cognizable breach had occurred. The traditional model explicitly sought to discourage exit and to make it costly for the individual at fault. The contemporary model has abandoned all reference to traditional gender roles although these continue to form the backdrop against which judicial

²⁶ Dworkin, 'The Place of Liberty', *loc. cit.*, 7.

²⁷ Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 262-3.

decisions are made. The abandonment of traditional role or status concepts, given that obligation and breach were perceived and defined in these terms, has been ratified by the elimination of the concept of fault in many jurisdictions, including Australia. In an important sense, the marital relationship has been redefined as an emotional or affective bond between equal individuals rather than as a status relationship with defined (and hierarchical) bonds of obligation and loyalty. Exit has, in formal terms, become readily available as an option.

If the models described in the last paragraph share common ground, it lies in the almost total absence of any attempt to ensure that both parties are equally free to make their voices heard within the relationship and influence its direction in critical areas. Emphasis has been entirely directed towards manipulation of the conditions under which exit is possible rather than examination of the conditions necessary for voice to be developed and sustained. The emphasis upon exit rather than voice both conceals intervention and does little to mitigate any existing power differentials within family life. We saw earlier the ways in which marriage has traditionally been and remains today an asymmetrical relationship, one in which, through time, the vulnerability of the wife characteristically increases with the duration of the marriage, particularly with the birth of children. In this context, work done by Hirschman on the complex relationship between the degree to which individuals are able to make their voices heard within a relationship and the feasibility of exit from that relationship is significant. Hirschman notes that where exit is readily available, the art of voice is unlikely to develop. Similarly, where the exit option is restricted or limited in feasibility, voice is unlikely to be effective since the threat of exit is a significant way of commanding attention and making one's voice heard.²⁸ Neither the traditional law of marriage and divorce nor the contemporary no fault model have structured the legal regime in a way which has maximized the availability of voice within the relationship and ensured that it was non-differentiated by gender. Because men typically have greater individual access to resources and fewer domestic and parenting responsibilities, women are more vulnerable within marriage. Their greater vulnerability frequently inhibits the development of voice, and their socially constructed responsibility for the welfare of children inhibits it still further. These same circumstances often limit the feasibility of exit as a real option, even where exit is formally readily available.

The emphasis upon exit rather than voice emphasizes the degree to which marriage is perceived both as private and as voluntary, as a relationship which lies outside of politics.²⁹ It

²⁸ A.O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Cambridge, Harvard Univ. Press, 1970, 43, 55, 83. See also A.O. Hirschman, 'Exit and Voice: An Expanding Sphere of Influence' in A.O. Hirschman (Ed.) *Rival Views of Market Society and Other Recent Essays*, New York, Viking, 1986, 96.

²⁹ With respect to political relationships, both Dworkin and Rawls emphasize the critical importance of voice and the need for its support and protection, particularly given their shared understanding that no exit from political relationships is possible. Rawls emphasizes this in 'The Basic Liberties and Their Priority', *loc. cit.*, where at 39-46 he addresses the fair value of the basic liberties, the difference principle acting to maximize the capacity of the least advantaged to make use of the equal basic liberties

may appear that ensuring the approximate equality of voice or influence is unimportant precisely because of the possibility of exit, of voting with one's feet. Both Rawls and Dworkin emphasize the degree to which membership in political society is non-voluntary, a condition from which no exit is possible, even while emphasizing the voluntariness of other choices. If that is the case it may also be thought that the gradual historic move towards enhancing access to the exit option has made family law as a whole more consonant with egalitarian ideals by ensuring that people do, in fact, have the freedom to opt out of unsatisfactory relationships and explore other options. Yet this approach remains fundamentally unsatisfactory for a number of reasons, each of which emphasizes its conflict with other elements of egalitarian ideals. First, the present model allows one individual to arbitrarily impose his or her choice upon the other individual or individuals involved because in the context of family law exercise of the exit option results in the destruction of the group. Decision making can be, and often is, unilateral, and the no fault model does not provide a reluctant spouse with the opportunity to be heard. Second, because women tend to be economically vulnerable within marriage, and their vulnerability increases both with childbearing and with the duration of the marriage, they often become still more vulnerable upon dissolution of marriage, even where they have themselves chosen the exit option. Indeed, the increasing proportion of women electing dissolution may reflect their inability to have their needs recognized and met within the relationship, their inability to make themselves heard. In this respect contemporary family law falls far short of egalitarian ideals in that it fails to recognize and to compensate for the economic inequality of the parties and the fact that men command greater power and resources within the society as a whole. Where the development of voice is stifled, exit may represent the only option, despite the cost to both women and children. Third, the characterization of the marital relationship itself as non-obligatory, which is implied by the irrelevance of fault, conflicts with the moral emphasis of contemporary egalitarian theories. It is difficult to reconcile this perception either with Rawls' account of the development of a sense of justice or with Dworkin's account of associative obligations.³⁰ Thus, on a number of distinct levels it would appear that the contemporary model of family law is somewhat difficult to reconcile with egalitarian ideals.

constitutionally guaranteed. Similarly, Dworkin emphasizes the agency goals of politics and the need to ensure that all citizens enjoy a degree of political leverage in 'Political Equality', *loc. cit.*, 21-28.

30 It may be, although given his profound theoretical ambiguity, it is difficult to be certain, that this would not pose a problem in the context of Dworkin's theory, taken as a whole. If associative obligations are simply felt moral constraints belonging to personality and pertain to the domain of ethics (the good) rather than morality (the right) no conflict exists. That this is the best interpretation of his work is strongly suggested by his comment that while many people have a moral conviction that they ought to obey the law (a conviction belonging to the personality of the individual) '*legal constraints, so far as they belong to circumstances, are to be viewed as Holmes' "bad man" would view them - as threats putting up the cost of the actions they forbid.*' Dworkin, 'Equality of Resources', *loc. cit.*, 19, n. 21. Legal constraints are only relevant to equality insofar as they belong to the circumstances of the individual, and not to his or her personality. If I am correct in this, obligations such as those involved in marriage, while subjectively binding, have no objective force and it is wholly consistent that the law fail to recognize them.

While it mirrors the egalitarian presumption that marriage, like other private decisions such as choice of religious faith or club membership, may be accounted for using the model of rational choice, and that it is among those ends individuals ought to be left free to revise as their final ends change and develop, it fails to recognize that the choices involved in family life inevitably and profoundly implicate others. What is at stake in family law, uniquely, is the fragmentation of a social group, not the departure of one individual from a fluid and ongoing voluntary association.

The traditional model fares no better in egalitarian terms. First, the severe restriction of the exit option and the conditions imposed upon its exercise left many individuals unable to exit from even quite demeaning and unequalitarian relationships. This was particularly true of those early legislative regimes in which the availability of the exit option was differentially allocated by gender. Second, the profound reluctance of the law to intervene in subsisting family relationships to enhance the exercise of voice and to ensure that obligations were in fact honoured effectively eradicated the capacity of the more vulnerable partner to make herself heard within the marriage. This was a consequence of the fact that the obligations of marriage could not be enforced until separation occurred, making exit the only option, particularly for the more vulnerable party. Third, the intimate connection between the legal recognition of fault and traditional and socially enforced gender roles denied the individuality of the persons involved and often, even where divorce was available upon identical grounds to both spouses, in practice operated to favour masculine interests. An adulterous wife was far more severely penalized than was an adulterous husband and a wife who neglected her domestic responsibilities was, in practice, subject to far greater censure than was a husband who neglected his family or wilfully provided inadequate support. Under traditional family law there was effectively only one person and that was the husband. So long as the marriage subsisted he alone determined the domicile of the parties, he alone was entitled to exercise guardianship rights over the children of the marriage, he was entitled essentially absolutely to sexual access, and, while he was legally obligated to provide support according to his means, it was he who determined the level of support which was appropriate until separation occurred. During this same period violence within the home was legally invisible, often perceived by the courts as something its victim ought to accept, at least within limits,³¹ and for which the victim bore substantial responsibility. The traditional model ratified masculine authority during marriage and protected its exercise.

If neither the traditional model nor the contemporary model can be reconciled with contemporary egalitarian theory *once it is acknowledged that women rank equally as moral persons* it becomes important to reexamine these regimes utilizing a very different basic assumption. It is superficially plausible to acknowledge women as legal persons who are entitled to exercise rights within the public sphere and to simultaneously regard their social

³¹ *Devitt v Devitt* [1957] Tas. S.R. 11.

roles as wives and mothers as wholly irrelevant to theory, as nonpolitical and wholly private. Indeed, so long as men's roles as husbands and fathers are likewise privatized, become opaque to the law, such an approach seems fundamentally consistent with the Rawls' assertion that such roles belong to the nonpolitical and with Dworkin's insistence that his account of equality does not represent a way of life for individuals. Indeed, Dworkin's acknowledgment that his associative obligations are none other than what have conventionally been described as 'obligations of role'³² emphasizes the fact that while such obligations are subjectively binding they are objectively voluntary and thus may be characterized as features of personality. This is the precise import of the assumption that such roles are voluntarily assumed, and for that reason outside the scope of the egalitarian concerns of such theories. If men and women choose to adopt traditional roles, egalitarian theory might be thought to require only that, should they later desire to revise their choices the means be available for them to do so. Ready availability of the exit option, as under the contemporary model of family law, might be said to be sufficient. Just as Rawls, in discussing religious communities who choose to reject the values and lifestyles of contemporary society, notes that all that is required in respect of the education of children is that they be taught that the law will protect their exit rights from such communities if they choose to exercise them, so men and women must be granted exit rights and be aware that they have those rights.

Under the contemporary model, perhaps significantly, it is as citizens that the law is invoked. Contemporary family law emphasizes the public status of the parties, not their private roles. They come before the court as legal persons not as husbands or wives. Children have also been recognized as legal persons and custody decisions must formally be made in a way which takes their interests into account.³³ Rights and obligations are formally interchangeable, statutorily undifferentiated by gender. The language of fault has been eradicated and in its place is a discourse of irretrievable breakdown. Exit has been greatly facilitated, only the fact of breakdown being relevant. Yet even if the parties before the court are simply legal persons or citizens, formally undifferentiated by gender, an anomaly persists in that one party is legally entitled to impose his or her will upon the other party in those cases where separation is not by mutual consent. The absence of fault imposes a fictive mutuality upon proceedings, although, particularly where there has been a history of alleged violence or an injunction is sought to exclude one party from the matrimonial home the lack of mutuality becomes evident.³⁴

This lack of mutuality points to a quite fundamental difficulty in egalitarian theory. At the core of liberal presuppositions concerning personal relationships such as marriage is the

³² Dworkin, *Law's Empire*, *loc. cit.*, 195.

³³ In practice, of course, in the vast majority of cases the court simply ratifies privately made decisions.

³⁴ Eg. *Aly v Aly*, (1978) F.L.C. 90-519, *O'Dea v O'Dea* (1980) F.L.C. 90-896.

fixed view that such relationships give effect to the voluntary choices of the parties. They epitomize those private decisions individuals make concerning an appropriate life for themselves, and, likewise, those decisions they are at liberty to revise. Yet to the extent that the individuals involved are not equally placed with respect to access to resources, are not equal in bargaining power, decision making is likely to become imbalanced, giving the preferences of one individual precedence over those of the other. Frequently the preferences of the more vulnerable individual are shaped both by vulnerability and by the recognition of that vulnerability, particularly where the effort to assert a divergent set of preferences is likely to increase rather than reduce vulnerability. Likewise, where the desire to terminate the relationship is not mutual, the potential for unilateral decision making belies the characterization of such relationships as voluntary, as the outcome of individual choice. If the traditional fault based regime, with its backdrop of virtually absolute authority in the husband and father is unsustainable on egalitarian grounds, its abolition provides a singular illustration of its attraction for earlier liberal thinkers. If authority within the family was clearly and authoritatively assigned, if its parameters were clearly established and its limits proclaimed, and provision made for its termination when that authority was, in effect, exercised *ultra vires*, beyond the purposes for which it was established, no conflict of interests could arise. The family might thus be said to speak with one voice.

Once multiple voices are recognized, once the potential exists for conflict of interests within families as well as among families, its relegation to the private sphere is no longer tenable. The attempted resolution of contemporary law, the virtual elimination of restrictions upon exit, and the shift from formal decision making predicated upon relatively certain rules to discretionary decision making predicated upon broad and purportedly equitable guide-lines fails for two quite distinct reasons. First, where preferences diverge, where one party seeks to sustain the relationship where the other party seeks to determine it, the contemporary model encourages the legal system to enforce the preference of the individual asserting exit rights, thus denying the dissenting party the opportunity to continue to exercise voice within the relationship. Second, to the extent that choice is legally relevant only at the point of entry into the relationship and exit from it, to the extent that no concerted effort is made to eradicate existing imbalances within the relationship, thus facilitating the exercise of voice by both individuals upon an equal footing, the social conditions which, both historically and in the present, have rendered women disproportionately vulnerable remain unaddressed. Together, these deficiencies emphasize the significance of the failure of egalitarian theory to address the economic, social, and political inequality of women in other than the formal sense. This failure arises as a conceptual by-product of the existing theoretical division between public and private and the correlative assumption that private relationships, including family relationships, embody the preferences of individuals in respect of an appropriate life for themselves.

It remains to ask whether an account of family law could be devised which could be reconciled with the theoretical ambitions of egalitarian accounts of justice, and which would

ensure the equality of women at least to the same extent as that of men while *also* sustaining the division between public and private. Such a task is less simple than it might appear, indeed, even the elucidation of appropriate criteria for such an account emphasizes the practical and conceptual problems involved. Can the family remain private, remain the embodiment of the preferences of individuals regarding an appropriate life for themselves, and, at the same time, be restructured in a manner which conforms to the egalitarian ambitions of contemporary theory? Or, perhaps, might it be the case that such theories are fundamentally incoherent, that the distinctions and the divisions upon which they depend demand the exclusion of women-as-wives even while they compel the equality of women-as-citizens?

Perhaps the most critical change in an authentically egalitarian approach to the family would be a total change of direction or emphasis. Conventionally, regimes of family law have emphasized the regulation of marriage and divorce, emphasized entry into and exit from marriage. This mode of regulation reinforces the illusion of family privacy and the prevailing conception of the family as a voluntary association whose structure is determined by the choices and decisions of family members. Little if any attention has been paid to the existence or development of voice within family relationships. Yet, it is in the capacity to make oneself heard within a relationship, to have a voice in decision making, to be perceived as equally entitled to participate in significant decisions and to influence outcomes that many of the most severe tensions occur. Women remain identified with their family roles and with the duties and obligations traditionally associated with those roles to a far greater extent than do men. This identification frequently has the consequence that their voices are discounted both in terms of significant family decisions regarding the allocation of resources and responsibilities and in terms of participation in significant economic and public institutions. Because women are frequently perceived as wives and mothers, their voices go unheard unless they can be reconciled with the traditional constraints associated with that role.

Yet one of the hallmarks of egalitarian theory generally is its emphasis upon extending voice to all within the community and the intimate connection drawn between the capacity to exercise voice and independent access to resources.³⁵ Rawls emphasizes this in his discussion of the fair value of the basic liberties³⁶ and the role of the difference principle in ensuring this while Dworkin suggests that *'it seems unfair to ask people to accept substantive results they think wrong unless they have had as great a role in the decision as anyone else'*.³⁷ Both emphasize what Dworkin has termed 'agency goals', the capacity to make one's voice heard and to have an opportunity to be listened to, and both emphasize the critical importance

35 In many ways, this as well affirms the debt egalitarian theory owes to Rousseau. See Ch. 8.

36 Rawls, 'The Basic Liberties and their Priority', *loc. cit.*, 40-46.

37 Dworkin, 'Political Equality', *loc. cit.*, 18.

of access to resources in achieving and sustaining voice in the public sphere. Similarly, many of the contemporary reforms in consumer protection law, in administrative law, in corporate law, have been implemented with the specific aim of enhancing voice within a wide range of legal and institutional settings. Reforms ensuring an adequate 'cooling off' period in door to door sales, protection against undue influence and misrepresentation in consumer matters, legal protection against racial and sexual discrimination and sexual harassment have specifically been aimed at ensuring that disadvantaged individuals can make their voices heard *within* institutional structures and can gain redress for wrongs suffered. The emphasis is on individual empowerment, both ensuring that individuals are protected against the possibility that they will be compelled to endure wrongs in silence and offering them the opportunity to elect voice over exit and thus to play a significant role in modifying existing unjust practices rather than being compelled to choose between acceptance of what is and exit.

One of the hallmarks of family law since its inception has been its inattention to agency goals. While marriage laws generally have attempted to ensure that the consent of the parties is freely given and untainted by fraud or undue influence, little or no attention has been paid to agency goals within ongoing family relationships. This inattention to agency goals remains a feature of contemporary regimes of family law and reflects, at least in part, our entrenched cultural belief in family privacy and autonomy. Speaking of wider political relationships, Dworkin has argued that certain structures are essential to meet the participatory and other substantive goals of egalitarian politics. He argues that

*the symbolic goals argue for equal vote within districts, the agency goals for liberty and leverage, and the choice-sensitive accuracy goal for a large degree of equality of impact.*³⁸

How might an egalitarian regime attempt to ensure that similar participatory goals are realized within family life? As a symbolic goal Dworkin's egalitarian conception of equal concern demands both that men and women ought to have a equal voice in all significant family decisions because, given our culture, and in particular, given our very recent history of patriarchal institutions and denial of voice to women in all aspects of social, economic and political life, any deviation suggests that women remain of lesser importance as individuals.³⁹ In discussing the agency goals of political equality Dworkin argues that these goals can only be served by providing '*everyone enough access to influential media . . . to give each person a fair chance to influence others if he or she can.*'⁴⁰ He emphasizes that '*in our inegalitarian society, the most prominent source of inequality of access in (sic) inequality of wealth.*'⁴¹ Within our

38 *Ibid.*, 27.

39 Cf. the arguments put *ibid.*, 19-20.

40 *Ibid.*, 22.

41 *Ibid.*

society not only do women generally have less access to resources than do men of comparable education and talent, but also for many women their only access to resources is both derivative and dependent upon the choices and decisions of others. Not only do these inequalities operate to deny women leverage within the public sphere, but also they operate to deny many women leverage within the family. Given our cultural history, the degree to which our practices of family and community have distorted or denied women's voices, it may be suggested that even equality of resources may be insufficient, that moral agency may require more. Dworkin emphasizes that where political decisions ought for the sake of accuracy reflect the distribution of preferences within the community it is important that political impact be distributed roughly equally between electoral districts. Where, however, some districts have special interests or needs which might be overridden by strict equality, equality of impact might be disregarded in favour of special and limited inequalities.⁴² Again, given our recent history and practices, both those within the family and those within the wider community, women generally have been significantly less able to make their voices heard in many areas of decision making, whether such decisions involve allocation of resources within the household or wider communal decisions. Similarly, until very recently, married women were legally denied any legally cognizable voice in matters such as domicile and significant decisions regarding children.

The importance of each element in Dworkin's account of political equality lies in its capacity to enhance and guarantee voice and thereby further the substantive goals of an egalitarian political process. Any egalitarian account of family, and, therefore, any egalitarian legal regime impacting upon the family must, I would argue, similarly act to enhance and guarantee voice for family members. Given our recent history and conventional practices, it is necessary to explore what this might mean. We cannot simply assume either that existing family structures are reasonably just or that, at least with respect to their adult members, they are voluntarily entered and therefore somehow beyond or outside of the realm where justice is relevant. If families are the fundamental schools of our moral life, and if, as Rawls argues

*Justice is the first virtue of social institutions, as truth is of systems of thought,*⁴³

it follows that ensuring the development of such substantive goals within the family is both critical to its success and endurance as a social institution and fundamental to wider egalitarian goals. Just as Dworkin argues that a equal vote within districts is, given our political history and traditions, critical, I would argue that within the family men and women must have an equal voice in all decisions which impact upon family life. Wider institutions might act to further this goal in a number of different ways. Some of the changes required appear cosmetic but are of great symbolic importance, others require profound alterations in existing allocation

⁴² *Ibid.*, 25-26.

⁴³ Rawls, *A Theory of Justice*, *loc. cit.*, 3.

of resources. Because nothing of the sort has ever been attempted, or, apart from Plato, even seriously considered, and because little in our existing practices provides an egalitarian model their impact is difficult to assess. Two steps which are essential are to abandon all public reference to a head of household and to require the economic worth of domestic labour and parenting to be incorporated in the calculation of the gross domestic product. The first would recognize that in an egalitarian family no head of household can exist because all significant decisions ought to be made upon the basis of mutual consultation and negotiation between individuals who are roughly equal in their capacity to influence outcomes. The second would acknowledge the economic worth of domestic production and its contribution to the total productive capacity of the community while simultaneously emphasizing the almost absolute exclusion of women from economic power. The symbolic weight of these measures emphasizes the discrepancy between the symbolic affirmation of equality and social reality. To ratify and implement such symbolic affirmations of equality and agency, the existing allocation of economic and social resources must be altered as well. Among those scarce resources whose reallocation is critical are not only economic resources but also leisure and access to wider participatory opportunities. While I shall begin by looking at the redistribution of economic resources, I do not mean to emphasize their primacy thereby but only to acknowledge that access to wider participatory opportunities depends first upon access to economic resources and second upon the leisure to enable authentic participation.

REDISTRIBUTION WITHIN THE FAMILY - TOWARDS AN EGALITARIAN MODEL

Okin⁴⁴ has suggested that in those families in which the wife is wholly or primarily responsible for domestic and parenting labour while the husband is responsible for market labour employers ought to be legally required to divide all the wages paid to either equally between husband and wife. She argues that a requirement such as this

would constitute public recognition of the fact that the currently unpaid labor of families is just as important as the paid labor. If we do not believe this, then we should insist on the complete and equal sharing of both paid and unpaid labor. . . . It is only if we do believe it that society can justly allow couples to distribute the two types of labor so unevenly.

In those families in which equal sharing of resources and power already occurs a proposal such as this would have no practical impact. In less egalitarian families, access to resources and, in particular, independent control over discretionary income⁴⁵ may be critical in enhancing the capability of a non-wage earning spouse to insist on the right to participate equally in household decision making and ensuring that exit is, where necessary, practically as well as theoretically feasible. Negotiation is meaningful only where those concerned negotiate

44 Okin, *Justice, Gender, and the Family*, loc. cit., 170 ff. esp. 181-3.

45 By discretionary income I mean that portion of household income which is not required for commitments such as housing etc.

from positions of approximately equal strength. Full social implementation of this sort of resource sharing, of course, would require appropriate alterations to taxation and social welfare law, as well as to regimes of law governing dissolution of marriage. It might best be described as implementing the presumption of altruism conventional in accounts of the ideal family and giving it the force of law.

What of its theoretical congruence with egalitarian ideals? Okin's proposal emphasizes absolute equality of resources within marriage and marriage like relationships, altruism defined and enforced by law. It may be argued that, given the emphasis both Rawls and Dworkin place upon the connection between access to resources and political equality or voice, it is wholly consistent with the egalitarian ambitions of their theories. It is less clear whether it can be reconciled with other aspects of their theories taken as a whole.

Would, for example, such a program be consistent with Rawls' emphasis upon an overlapping consensus, upon an account of justice appropriate for a pluralist society? The answer is, I think, both yes and no. Certainly nothing in Okin's proposal is inconsistent with his recognition that families form part of the basic structure and represent the first, and perhaps most significant, source of our development of a sense of justice. Likewise, it is congruent with his account of the ideal conception of the family, and his comment that in this conception family members do not wish to gain unless they can do so in ways which further the interests of the rest.⁴⁶ Indeed, it might be interpreted as going some distance towards reconciling the profound contradiction between the ideal conception of the family and the social and economic reality. Whether it would be consistent with other elements in Rawls' theory is much more difficult to say. Among the basic political rights emphasized by Rawls is the right to hold (personal) property, and it may be suggested that this form of redistribution modifies that right in a way far more fundamental than the forms of redistributive taxation mandated by his theory generally. Okin's proposal severs the link between the labour of the individual and the social reward for that labour and is intended to do so. In that way it compels recognition of the social fact that the capacity of many individuals to engage in waged labour and to comply with the demands of the market depends in part upon their ability to appropriate the labour power of other individuals. On the other hand, such a program might be thought to simply eliminate in one limited and specific set of circumstances one pervasive distributive injustice, to ensure that the allocation of economic resources between husband and wife accords with the principle Rawls argues is fundamental and of which his theory represents a special case. As Rawls argues,

*All social values - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.*⁴⁷

⁴⁶ Rawls, *A Theory of Justice*, loc. cit., 105.

⁴⁷ *Ibid.*, 62.

If we consider existing distributive practices within families, and recognize that the prevailing allocation of domestic and parenting labour together with existing economic structures effectively ensures that in a majority of families men and women are not similarly situated in their access to economic resources, and further that, in general, men have disproportionately greater access to economic resources, it would appear that an equal distribution would be appropriate. No argument has been advanced that the existing allocation is, within the family context, to everyone's advantage, rather Rawls has *assumed* that altruism prevails and that family members do not wish to gain unless it is to the advantage of all.

Doubt must remain concerning the congruence of such a proposal with Rawls' theory taken as a whole for two quite distinct reasons. First, he explicitly excludes associations such as families from the political, the domain in which justice may be thought critical, and second, he is at some pains to argue that political liberalism '*does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality*'.⁴⁸ A proposal such as that cited might be interpreted as seeking to extend political values such as autonomy and individuality to the family context. Perhaps it does not go too far to suggest that it insists that all family members are, first and foremost, individuals to whom, as individuals, justice is due. In other words, it demands that, within the family as elsewhere, we '*take seriously the distinction between persons*'.⁴⁹ It would, undeniably, seek to ensure that the autonomy of individual women is supported by ensuring their access as of right to the material resources essential if they are to negotiate from an equal position. In this sense, it would undoubtedly be thought by some to represent an attack upon family values and upon traditional family roles and an extension of political values into a realm where they are at best inappropriate and at worst destructive. At a minimum, distributing resources in the way suggested would provide the material conditions essential for bargaining and negotiation on financial matters, suggesting that economic decisions within families ought to move closer to an idealized market model in which individuals bargain from positions of relatively equal strength to further their individual preferences. On the other hand, it might equally be argued that such a proposal merely seeks to compel the family as institution to live up to its ideal conception, because only that conception has the capacity to justify its traditional claims to privacy and autonomy, claims which are respected by his theory. Yet conflict inevitably arises if only because Rawls also seeks to insulate so far as is possible those who reject the culture of the modern world against intrusion by its alien values.⁵⁰ Many who reject the culture of the modern world also reject any effort to modify traditional gender roles or to weaken socially conventional authority structures within the traditional family, and Rawls affirms the validity of such roles and their

48 Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 268.

49 Rawls, *A Theory of Justice*, *loc. cit.*, 27.

50 Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 267-68.

irrelevance to (political) justice by asserting that they are voluntarily assumed. Many more might be dismayed at the intrusion of values such as bargaining into family decision making. In that way, a proposal such as this seems both profoundly in accord with the deepest ambitions of his own theory and in equally profound conflict with them. Can it be, perhaps, that Rawls has simply failed to acknowledge the pervasiveness of gender, the fact that no sphere of communal life can be viewed absent considerations deriving from it? Or is it, as argued in Chapter 6, that once one acknowledges that justice is relevant within families, no theoretically compelling cut off point exists, that families ought to comply with the principles of justice to the same extent as other social institutions, that it is morally impermissible to sacrifice justice to tolerance or to privacy?

If a note of uncertainty and ambivalence ends our appraisal of Rawls, does Dworkin's more individualistic account afford a clearer vision? His own account of political equality, extended to family structures, offered a compelling account of the reasons it is essential that legislative schemes impacting upon the family and upon family relationships redirect their focus from manipulation of the conditions under which exit is possible to the conditions essential if voice is to be protected and sustained. Does his account of resource equality, an account which we earlier questioned because it apparently allowed little redress for inequalities which arise as a consequence of the social allocation of responsibility for unwaged labour, leave greater conceptual space? Dworkin argues that

*if government succeeds in securing for each citizen a genuinely equal share of resources to use as he wishes in making his life successful according to his lights, then once again his choices will give effect to rather than corrupt what government has done.*⁵¹

The structure of Dworkin's account of equality of resources emphasizes that, once the '*unequal inheritance of wealth and health and talent*'⁵² have been ameliorated by redistribution so that approximate equality of resources prevails, the individual may '*suppose himself entitled to act for himself or others as he chooses*' unless it is unclear what has in fact been assigned him, as when the abstract rights deployed conflict in some way.⁵³ Taken at face value, Dworkin's account of equality of resources argues that given initial equality, the apparent inequalities which arise through individual preferences in work, leisure and consumption do not subvert the fairness of the scheme. Such choices merely reinforce what government has done, emphasize that the scheme is compatible with private ambition. What of a proposal such as that made by Okin?

51 Dworkin, *Law's Empire*, loc. cit., 299.

52 *Ibid.*, 301.

53 *Ibid.*, 300

Okin argues that *if* as a society we believe that domestic and parenting labour is as valuable as market labour, we ought to ensure that it provides equivalent access to resources. In traditional or quasi-traditional families this relative equality can be attained by distributing earned resources equally between husband and wife. Can this be reconciled with equality of resources? Two problems arise immediately. First, and obviously, it is not altogether clear that we so believe. Indeed, if we *did* so believe, it seems unlikely that many currently entrenched beliefs, such as that the husband's earnings and property belong exclusively to him, would continue to prevail. Second, more critically, Dworkin's argument for equality of resources depends upon the presumption that if a truly level playing field could be created the value of labour and goods would be just that determined by the interaction of community preferences, by our willingness to commit resources to secure them. Dworkin argues, as we saw, that if talents were equal, the resources available to an individual at any point in time ought to be a function of the resources available to or consumed by that individual at others, given an initial approximately equal division. Thus, those who choose to devote their talents to producing goods or services valued by others, as measured by the *willingness* of those others to commit scarce resources to acquire them, are entitled to the additional wealth at their disposal. The fundamental principle is that '*if people of equal talent choose different lives it is unfair to redistribute halfway through those lives*'.⁵⁴ On its face, given that husband and wife in a traditional family have 'chosen' different lives and have presumably made their choices upon a rational assessment of the options available, Dworkin's account would disallow the sort of redistribution Okin recommends.⁵⁵ As he notes, his theory, unlike equality of welfare, offers no rationale for '*correcting for the contingencies that determine how expensive or frustrating someone's preferences turn out to be*'.⁵⁶ It could, however, equally be argued that the life he chose, the overall balance between labour, consumption and leisure, was made possible by the fact that she assumed primary responsibility for domestic labour and parenting, that her labour not only generated much of his leisure but also contributed substantially to the forms of consumption available to him. On that interpretation, adequate compensation for her labour may also be said to be a part of the price of the life he chose, and failure to compensate profoundly unfair. On this interpretation, Okin's proposal would simply require that he and others similarly situated '*pay the true cost of the lives that they lead*'.⁵⁷ It would require that he acknowledge that the lifestyle chosen in fact imposes costs upon another and for that reason limits the resources which he may fairly use. What Okin's approach does not do, however, is value what *she* is able to produce by asking what resources others would be willing to commit to securing it. Rather, it suggests that because it is inappropriate to extend the concept of a

54 Dworkin, 'Equality of Resources', *loc. cit.*, 310.

55 Here I assume, for simplicity, that they have roughly equal talent.

56 *Ibid.*, 288.

57 *Ibid.*, 295.

market in the usual sense to the social role of wife and mother, it is appropriate to require that resources be distributed as if the value of her services were equivalent to the value of his and their preferences in terms of the appropriate mix of labour, consumption and leisure were likewise equivalent.⁵⁸ In that sense it conflicts profoundly with the individualism of his underlying thesis and might be said to superimpose a flat conception of equality upon his own individualized account.⁵⁹ While a different form of transfer payment, one which valued services provided in the home in terms of the market rate for comparable services acquired in the marketplace, would restore the individualistic structure of Dworkin's account, such an account, as we saw in Chapter 6, conflicts profoundly with his own account of associative obligations, indeed shifts marriage towards an idealized market model.

A further question, more fundamental in its impact, is specifically compelled by the individualistic tenor of Dworkin's theory. Dworkin has argued that the most compelling virtue of his account of equality of resources is that it offers an account of equality which is capable of accommodating the wide diversity of tastes, ambitions and conceptions of the good life characteristic of societies such as ours. We ought, therefore, be able to choose, on an individual basis, the particular combination of work, consumption and leisure which most closely accommodates our individual preferences. One of the interesting characteristics of Okin's proposal is that it rewards one category of structurally identical choices very differently. Even if we suppose that the existing and pervasive inequalities in society as a whole were substantially moderated this particular difference would persist. Just as individuals who participate in the marketplace differ widely in the particular mix of work, consumption and leisure they prefer, so also those who work in the home have similar differences. Under Okin's proposal, their differences and their preferences would impact upon resource outcomes to a far more substantial degree than is presently the case. The preferences of the market participant would not only have a significantly diminished impact upon outcomes but might well be significantly modified by both his diminished share of the resources attained in the marketplace and the fact that he would be compelled to take account of the preferences of another individual in a unique way. This emphasizes that while equality of resources can be interpreted in a way which would allow room for such a proposal, on a deeper level the incompatibility apparently remains. His choices in work, consumption and leisure would not, in fact, substantially determine his bank account wealth at any point in time. Ideally, her choices in work and consumption would play an equal role, severing to a substantial extent the connection Dworkin wishes to preserve between fully individualized choices and resource outcomes. Redistributing earned income in this way might be said to recognize that where an

⁵⁸ Okin, *Justice, Gender and the Family*, *loc. cit.*, 181-182.

⁵⁹ Cf. Dworkin's comparison between his own theory and that of Rawls, Dworkin, 'Equality of Resources', *loc. cit.*, 340-342.

ongoing relationship exists 'we must act as if the concrete rights we cannot both exercise had not been distributed between us, and we must distribute these as best we can.'

The arguments above have examined only one way of maximizing voice, of attempting to ensure the material equality essential if voice is to be sustained. Equally obviously, they address only one dimension of equality and only one conception of what might be termed the social basis for an egalitarian marriage. I have not even attempted to reconcile this form of redistribution with existing legal and political values, most particularly the deeply entrenched belief that the earnings of an individual are his to do with as he will, that they represent the worth of his labour. While both Rawls and Dworkin clearly recommend redistribution on egalitarian grounds, and apparently envision implementation through the taxation system⁶¹, neither wishes to break down our entrenched cultural connection between the exercise of skills and capabilities and energies and the rewards which ensue. It may, however, be thought that Okin's proposal goes rather further in that it endeavours to disestablish the relationship a theorist such as Dworkin desires to sustain between individual preferences in work, labour and consumption and the resources available to that individual at any point in time.

OTHER APPROACHES: REINFORCING COMPLEX EQUALITY

In the last section, one concrete proposal for enhancing the equality of women was examined within the forms of egalitarian discourse developed by Rawls and Dworkin. In both cases, upon the best interpretation of their accounts of distributive justice, adequate conceptual space was available. However, on quite another level, it was difficult to accommodate within their conceptual frameworks. Paradoxically, it seemed that such a proposal would both be mandated by their theories and rejected by them. For Rawls this came about because it both affirmed values implicit in his theory and denied others which he emphasized would not be violated by political liberalism, particularly given his emphasis upon the need for a stable overlapping consensus. For Dworkin, on the other hand, it is both implicitly recommended by his account of political equality and by some aspects of his account of equality of resources, but conflicts profoundly with its individualism, its mode of valuation and with his emphasis upon freedom of choice in family arrangements.

Yet, equality of access to economic resources represents only one aspect of an egalitarian distribution within the family, and therefore only one element in an egalitarian family law. In many ways, the social allocation of leisure and of responsibility is at least as critical as the distribution of resources, a fact which is obscured in theoretical accounts which suggest that the individual balance of work, leisure and consumption may be linked to individual preferences. What can be said about the distribution of leisure in the family, and,

60 Dworkin, *Law's Empire*, *loc. cit.*, 303.

61 Rawls, *A Theory of Justice*, *loc. cit.*, 274-84; Dworkin, 'Equality of Resources', *loc. cit.*, 326-27.

more importantly, about the degree to which this distribution is influenced by individual preferences? Leisure is conceptually ambiguous. In ordinary discourse, leisure time is discretionary time, time in which one is free from the pressure of necessary activities and which one may allocate as one pleases. In economic discourse, on the other hand, leisure denotes that time which is not devoted to earning a living or to consumption, irrespective of whether the activities involved are in any sense discretionary. Neither Dworkin nor Rawls offer any analysis of the concept, a fact which is significant in that Dworkin's account of equality of resources makes extensive use of the concept and Rawls has suggested that leisure can, in principle, be included among the primary goods. In that regard he has suggested that

*twenty-four hours less a standard working day might be included in the index of primary goods as leisure. Those who are unwilling to work would have a standard working day of extra leisure, and this extra leisure itself would be stipulated as equivalent to the index of primary goods of the least advantaged.*⁶²

In this passage at least, Rawls adopts an economic definition of leisure, '*useful uses of time for purposes other than income-earning activity or the consumption of goods.*'⁶³ Dworkin makes a similar distinction between work, leisure and consumption. What can be said of the allocation of leisure within the family? In traditional households a large proportion of the housewife's day would, on the economic definition, apparently be characterized as 'leisure'. Child care, housework, meal preparation and similar activities vanish within the phrase '*useful uses of time for purposes other than income-earning activity*'. It can thus appear that married women, on the whole, enjoy substantially more leisure than married men, in that, irrespective of whether they are housewives, part-time employees or full time participants in the labour force, women tend to devote fewer hours to income-earning activity. In this way, women's household labour becomes no more than a leisure activity. If, and the contextual evidence is strong for this presumption, we presume that Dworkin and Rawls do in fact make use of the economic concept of leisure, women's generally disadvantaged economic position is a function of their preference for leisure over work, and no injustice is involved. On the other hand, they *may simply perceive no conflict* between the economic definition of leisure and its ordinary usage. That is, for both Rawls and Dworkin, leisure may actually be that time which is not devoted to activities related to their professional lives or to consumption, a perception which seems reasonable because, for a majority of men, participation in housework, child care and associated activities is, in a real sense, discretionary.⁶⁴ The same is simply not true of the

⁶² Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 257, esp. n. 7.

⁶³ See R.A. Musgrave, 'Maximin, Uncertainty, and the Leisure Trade-Off', 88 *Quarterly Journal of Economics* (1974) 624, 629 and n. 7. Cf. Rawls' discussion of the leisure trade-off in J. Rawls, 'Reply to Alexander and Musgrave' 88 *Quarterly Journal of Economics* (1974) 633, 653-55.

⁶⁴ In that respect it is worth noting that employed married men in Australia apparently spent somewhat less than 10% of their time on all household activities, while employed married women spent almost 30% of their time on such activities. Time

great majority of women. Most women, even those who participate full time in the labour market, devote a substantial number of hours to the domestic economy and this work is neither wholly discretionary nor income generating nor do the activities involved necessarily reflect their preferences, as individuals, for the utilization of that time not devoted to income generation. In that sense, it is irrational to describe the time devoted to housework and child care as leisure time. Child care, in particular, while frequently valued and enjoyed, is not perceived as discretionary in any sense, but morally obligatory. The fact that it can be both valued and enjoyed does not lessen its status as work. Many individuals both can and do take pleasure and pride in their work. Indeed, in a better and more nearly just world than our own, one might hope that this would be true of most individuals. Rather women's labour represents work whose surplus value has been appropriated by others. These 'others' include, not only their own husbands, but also those wider institutions responsible for the structure of workplace requirements, of professional responsibilities, and, indeed, even of institutions such as the trade union movement. In this context it is important to recognize that it has been estimated that the household labour of a full time housewife generates approximately one half the discretionary income of the average family in the United States.⁶⁵ Whether she has, under existing conditions, been allowed to perceive such as her entitlement, is, of course, a very different matter, as is the question of her *entitlement*, legally speaking, to any proportion of the discretionary income of the household.

FOSTERING COMPLEX EQUALITY

Yet, returning to the underlying emphasis of both Dworkin and Rawls upon generating the social, political and economic conditions essential if individual men and women are to develop and sustain voice within the society as a whole, it is appropriate to ask whether other approaches might better realize this goal. One might, for example, argue that a taxation rebate ought to be available to every household in which young children reside equivalent in value to the current market cost of child care in a child care centre.⁶⁶ Such rebate ought to be payable to the principle carer or carers in such households. It would replace all existing family rebates and allowances and should incorporate provision for a national superannuation scheme for full time child care providers which ought to be both compulsory and fully portable thus enabling it to be integrated with workplace schemes. The actual amount of the rebate would depend upon the number and the ages of children requiring care, and it would be discontinued

Use Pilot Survey, *loc. cit.*, 36. Unemployed married men devoted only 15% of their time to household activities while unemployed married women devoted 30% of their time to such activities. Perhaps more significant is the fact that where participation is broken down by age group, men in the child-rearing years, 25-44, spent no more than 5% of their time on housework and child care combined, while women in the same age range spent between 20 and 25% of their time on those activities. See p. 39.

⁶⁵ I. Sirageldin, *Non-Market Components of National Income*, Ann Arbor, Univ. of Michigan Survey Research Center, 1969.

⁶⁶ In Hobart, full day care for two pre-school children costs about \$200 per week.

when the youngest child reached the age of twelve. A child care rebate, properly designed, should be structured to build on social provision of six months paid non-transferable parenting leave to each parent of a new born (or adopted) child. Both parents are, *prima facie*, equally obligated to provide both economic support and nurturing for all those children for whom they are morally or legally responsible, and a just society ought to structure its principal economic and social institutions in such a way as to facilitate and encourage this. The existing division of market and domestic labour and the resultant economic inequality, I would argue, represent an accurate measure of one major injustice in contemporary social institutions.

Would a program such as that sketched above be consistent with the general theoretical structure developed by either Rawls or Dworkin? Unlike Okin's proposal, it does not represent a direct redistribution between spouses which depends upon the earning capacity of the waged spouse. In that respect, I believe it to be preferable because it attempts to isolate the opportunity costs involved in parenting and to acknowledge that the social value of parenting is wholly independent of the earning capability of a waged partner.⁶⁷ Okin's proposal, on the other hand, seemingly suggests that the value of domestic labour and parenting ought to be derived from the earning capability of a waged spouse, which seems counter-intuitive given that the difficulty inherent in both tasks tends to increase as resources diminish. (In a just society, of course, such discrepancies would not exist to the extent to which they do in existing unjust societies, however we are, of necessity, here considering the realm of partial compliance.) Underlying a partially publicly funded redistribution which recognizes both the opportunity costs inherent in caring for children and the fact that its present and future citizens are the single most important resource of any community, are two further aims. The first is providing tangible recognition of the fact that the community as a whole has an interest in the welfare of its children and in ensuring that those providing care are not, as they are at present, profoundly, and often permanently, economically (and socially) disadvantaged by doing so. The second is recognition that the community as a whole has an interest in the full development and utilization of all the talents of each and every one of its citizens, male and female. Both of these are, I believe, aims which ought to be central to any egalitarian society.⁶⁸ Just as many women presently find it difficult or impossible to sustain development of their full capabilities because these are incompatible with their child care responsibilities and because those who work part time frequently find that their child care expenses render part time work economically disadvantageous even where it is essential to maintain and

67 Where the wage earner's income is insufficient to provide the full rebate, as is the case for some individuals in existing unjust societies, the shortfall would need to be met by the state in the form of a negative income tax.

68 While it might be suggested that these aims are fundamentally perfectionist, I believe that they do little more than take seriously the differences between persons and the fact that, under favourable conditions, normal individuals do, in fact, value the development and exercise of a wide range of skills and capabilities, particularly when exercised in company with others.

develop skills or to sustain self-esteem, many men fail to develop their nurturing capabilities to any meaningful extent. Such a program, fully implemented and accompanied by structural changes facilitating job sharing and part time work by both men and women, and encouraging women's participation in further education and training would go some way towards enabling women not only to choose the balance of market labour, nurturing labour and education which best suited their needs at any point in time but also providing them with the economic power essential if they are to negotiate role sharing in the fullest sense with their partners. Given these broader egalitarian goals, each parent ought only be entitled to a rebate equivalent to one half the market cost of child care⁶⁹, since, in a two parent household that represents the extent of his or her wholly individualized obligation. While this may appear counter-intuitive, even unjust, in that it seemingly disadvantages those individuals who assume full responsibility for parenting and domestic labour while their partners assume full responsibility for the provision of resources, I do not believe this criticism is justified. First, what I am proposing is not a wage for child care as such. Rather, my proposal gives priority to (at least partial) compensation for the opportunity costs inherent in parenting, *given institutional structures which are not just*. In a two parent family, structured on egalitarian principles, these opportunity costs (which are individually borne) would be shared between the parents, each parent having a wholly individualized obligation to provide care, just as each parent has a wholly individualized obligation to provide support. Where such principles are not adhered to (for whatever reason) neither parent is negotiating the obligations inherent in parenting fully. The waged parent might be said, using Rawls' phrase, not to be sharing fully in the burdens of social cooperation. Likewise the unwaged parent might properly be thought to have failed to meet the obligation to provide support. It may be, therefore, suggested that the extra support provided by the waged parent effectively cancels the extra care provided by the unwaged parent. Compensation⁷⁰ is due those who attempt to fulfil their individual obligations fully and are disadvantaged by doing so, not to those who, for whatever reason, choose not to do so. It must be emphasized that a proposal such as mine is necessarily a response to existing unjust conditions, one which it is hoped will ultimately shift the balance towards a more equitable distribution of the burdens and benefits of social cooperation. Were the burdens and benefits

69 In existing unjust societies, of course, the market price for child care is artificially depressed because wages for child care workers reflect the supposition that little if any skill is required to care for young children. In a more nearly just society, this would not be the case. Such workers would be regarded as skilled professionals and salary structures would reflect this recognition.

70 Here it must be noted that I explicitly identify my proposal as compensatory (or redistributive) in structure. It is necessitated by the fact that, where child care is provided by the biological or social parents, no market in the ordinary sense exists. My proposal represents an attempt to minimize the opportunity costs presently associated with parenting without defining privately provided nurture as an occupational choice in the strict sense. Rather, as I shall argue subsequently, participation in the social reproduction of future generations on a personal level is an obligation which a just society would recognize and reward, and one which in no way depends upon biological sex or social gender.

of cooperation justly shared, implementation of such measures would be unnecessary. *Given that they are not, it becomes critical to ensure that any compensatory measures do not have the effect of further entrenching and reinforcing existing non-ideal practices even while they simultaneously offer some redress for existing injustices.*

Central to the proposal put above is the fact that the proposed rebate is compensatory in intent and structure. It is designed to provide partial acknowledgment of the individualized opportunity costs inherent in parenting and the value of parenting to the community as a whole. As such, its quantum is linked, not to the total amount of care provided by any individual, but to the proportional obligation of that individual to provide care. Rather than provide a wage as such, it focuses upon the opportunity costs inherent in even temporary withdrawal from the labour market and endeavours to minimize these and encourage their more equitable distribution. Were it simply treated as a wage, further problems would arise within any egalitarian framework, including, for example, the application of equality of fair opportunity to services provided within the private household. In structuring my proposal within a compensatory framework I am attempting, *arguendo*, to maximize its congruence with the overall structure of egalitarian accounts as they stand.

Obviously, it might be said that my proposal fails to be neutral between social outcomes, and this is both correct and inevitable. With respect to the family and to family structures, as elsewhere, neutrality does not exist. Whether we elect to modify existing practices and structures, or whether we elect to preserve the *status quo*, legal and economic structures inevitably constrain individual conduct and make some choices more attractive than are others. To believe otherwise is irrational. Against the background of social, political, and economic structures which have penalized departures from conventional gender roles, sometimes severely, and affirmed traditional gender roles, albeit to varying degrees, such a proposal is modest indeed. I would argue that it simply attempts to shift the balance towards recognition that each and every parent is obliged to provide both support and care and nurture for children, to ensure that the benefits and costs are fairly shared. We are here dealing with a proposal designed to partially redress pervasive existing injustices, not an ideal theory account.⁷¹ Second, if one accepts, as do both Rawls and Dworkin, that the development of leadership skills and capabilities and the capacity to influence others is important to the individual, enhances individual agency, and if, as Rawls suggests, the workplace provides one important setting in which these capabilities are developed and explored, it may be critical to

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The underlying logic is similar to that used by Dworkin to suggest that, in the context of voting rights, it might be appropriate for residents of very poor urban districts to have greater legislative representation where it might be thought that this might produce more just (because more egalitarian) outcomes. Dworkin, 'Political Equality', *loc. cit.*, 6. Given our cultural history, and the social and economic outcomes characteristic of it, and given the evidence that women enjoy substantially less power in all spheres than do men, it does not seem unjust to structure a remedial measure to encourage a more egalitarian division of burdens and benefits.

the development of a sense of justice within the community as a whole that all participate to the greatest extent possible. Thus where, as remains the case in many families, only one parent participates in labour market activities, the total rebate available would represent one half the cost of creche care and would be remitted directly to the unwaged parent.⁷² This follows directly from the fact that both parents have an obligation to provide care, just as both parents have an obligation to provide economic support. Where one parent provides full support while the other provides the vast majority of nurturing labour neither is negotiating both obligations fully.

COMPLEX EQUALITY AND RAWLS

Given the structure of Rawls' theory, such a program, like that advocated by Okin, would clearly be one which would be implemented at the legislative rather than constitutional phase.⁷³ Thus, its acceptability would be determined under conditions of full knowledge of existing economic, social, and political conditions and the costs and strains it would impose upon existing institutions, including the necessity of building and/or sustaining the stable 'overlapping consensus' of which Rawls speaks. In other words, it would represent one of a number of policies which might be thought to make the community as a whole more nearly just. Its reasonableness would depend upon whether it could be reconciled with the principles of justice chosen in the original position and most particularly with the overriding commitment to fair equality of opportunity and the substantive content of the difference principle, that inequalities are allowable only if allowing them will '*maximize . . . the long-term expectations of the least advantaged group*'.⁷⁴ I believe that such a proposal could be reconciled with the substantive thrust of equality of fair opportunity, *so long as it is borne in mind that it is a compensatory program* which is necessitated by existing structures which render parenting and market labour less than fully compatible and thereby vitiate fair equality of opportunity. It seeks to ensure that both parents have the resources required if they are to pursue opportunities in the community at large, be these educational, social, political or economic. The pursuit of opportunities is seldom, if ever, costless. My proposal endeavours to encourage the development of the background institutions and structures essential if equality of fair opportunity is to have other than rhetorical content. In this context, it must be emphasized that opportunities cannot be considered acontextually, that in the real world the capacity to pursue and make use of the opportunities theoretically available frequently depends, *inter alia*, upon socially constructed responsibilities and the constraints which they impose.

72 In Australia, clearly, the mechanism presently in place for the Child Support scheme could easily be adapted to this wider social purpose. See *Child Support (Registration and Collection) Act 1988*, *Child Support (Assessment) Act 1989*.

73 Rawls, 'The Basic Liberties and Their Priority', *loc. cit.*, 52, where he notes that it is not appropriate to incorporate provisions regulating social and economic inequality in a constitution.

74 Rawls, *A Theory of Justice*, *loc. cit.*, 151.

Given its compensatory structure, its congruence with the difference principle may pose greater problems. Strictly speaking, Rawls' argument identifies homemakers as 'voluntarily unemployed', and suggests that their 'extra leisure' ought to be treated as equivalent to the basic goods of the least advantaged group. It follows that no specific compensation is required for the disadvantages inherent in parenting in our culture and given our institutions. Even if we insist that what goes on in the home is work, albeit unpaid work, rather than leisure, and that compensation is therefore morally required, Rawls' reliance upon such conventional redistributive tools as family allowances and rebates for dependents⁷⁵ and his emphasis upon the distribution of commodities to households, not individuals, obliterates what occurs in the household and renders it, and the opportunity costs associated therewith, irrelevant to distributive justice and it is this network of linked assumptions which must be disrupted and destabilized. Inevitably, once we focus upon households, not only do we lose sight of distribution within households, but also we lose sight of the fact that within households are individuals who are differentially advantaged or disadvantaged. We fail, in other words, to take seriously the differences among persons and assume instead that those choices which might be thought to maximize the economic well-being of the household as a unit are in the individual interests of family members. It is imperative to emphasize that all the arguments advanced by Rawls against utilitarian assumptions within the public sphere are equally relevant applied to the private. Either we take seriously the differences among persons or we fail to do so. Where justice is at stake, an each way bet is inappropriate.

Rawls, as we have seen, tentatively identifies the least advantaged group as unskilled workers or labourers. While the problematical nature of this was addressed at length earlier, as was his alternative formulation,⁷⁶ it is worth exploring the consistency of my proposal with his account as it stands. If we follow him in this, and ask whether such a program would place *this group* in a position preferable to that they would occupy under a flatly egalitarian division of income and wealth, we note first that it might appear that the benefits are unevenly distributed within the class of labourers, given that we are to focus our attention exclusively upon the distribution of income and wealth. However, given that, according to Rawls, we ought to reason from the perspective of the 'representative' member of this group, it remains reasonable to argue (on the basis of Rawls' assumption that what is relevant is the income stream available to the household) that the representative unskilled worker will, during the course of the normal life, indeed benefit. That individual, is, if we accept Rawls' assumption, in no way disadvantaged, indeed my proposal appears neutral with regard to the 'representative unskilled worker'.

A much more serious problem arises in that, as a consequence of the present gendered distribution of labour and of existing social and economic structures within cultures

⁷⁵ *Ibid.*, 275-278.

⁷⁶ See Ch. 3 and the discussion earlier in this Chapter.

such as Australia, England and the United States, my proposal is, in the real world, specifically targeted at enhancing the position of women and the opportunities realistically available to them as a discrete group. Given present social and economic structures and gender roles, my proposal identifies the mothers of young children as the least advantaged group. It takes a specific socio-historic role, one which has arisen as a consequence of concrete and specific social and economic developments as the benchmark. What I am suggesting is that, in fact, given our history and culture, women, specifically mothers of young children, must be seen as the least advantaged group. Their relative disadvantage can be denied only if we allow conventional assumptions concerning families and family roles to blind us to their very real disadvantages, and, in particular, their lack of individual access to many, and in some cases, almost all, of the basic social goods Rawls deems essential. Rawls, however, appears to rule out the possibility that women as a group might constitute the least advantaged group unless unequal basic rights were assigned upon the basis of biological sex as was, of course, the case in the recent past.⁷⁷ At the very least, he emphasizes the use of broad traditional economic classifications which emphasize household income⁷⁸ in determining disadvantage and does not at any time consider the impact of the sexual division of labour upon access to the primary goods. It is in this context, of course, that equality of opportunity becomes critical. In the world as we know it, worker and primary parent come close to being mutually exclusive terms. It is irrational to suggest that offices and positions can be said to be open to all under conditions of fair equality of opportunity when those same offices and positions are structured in a way which renders them almost incompatible with ongoing personal participation in parenting. In practice, if not in theory, many of them are open only to those who do not participate in parenting to any substantive extent, and likewise parenting, to the extent it may be described as an office or position (albeit unwaged) is open, as a concrete and realized social practice, only to those who restrict their participation in the offices and positions characteristic of the public sphere and accept the economic and social disadvantages, including lack of access to the primary goods, which attend this choice. Given the central place of the principle of equality of opportunity in Rawls' account of distributive justice and its precedence over the difference principle, a way must be found of reconciling the demands of the public and private spheres, and, I would argue, the substantive emphasis of my proposal is structured to encourage just such a reconciliation.

Further problems arise because my proposal makes no attempt to be neutral between social outcomes at least in respect of family roles and the choices available to adult family

⁷⁷ Rawls, *A Theory of Justice*, loc. cit., 99. Rawls insists that justice as fairness ought to appraise the social system so far as possible from two perspectives: that of equal citizenship and that of the representative individual's position in the distribution of income and wealth. Only where unequal basic rights are assigned, on, for example, the basis of biological sex, need other positions (or roles) be taken into account.

⁷⁸ Rawls refers, for example, to family allowances and to 'the usual rebates for dependants'. *Ibid.*, 275-278.

members. On the structure outlined above, the greatest economic benefit would be realized by those couples who were able to negotiate role sharing sufficiently to ensure both that less than full day care was required by young children and that each partner maximized his or her individual income earning capability given the hours available and irrespective of the total income stream available to the household. The substantive goal emphasizes the long term importance of encouraging all women to develop and sustain their economic skills while simultaneously encouraging men to develop their nurturing capabilities and extend their involvement in the life and work of the household. Through economic incentives it undoubtedly seeks to modify the prevailing gendered distribution of labour within the society as a whole and to offer the greatest support to those families where all adult family members attempt to meet their individual economic and parental obligations to their children while also ensuring that where either parent devotes great majority of his or her time to a parental role independent resources are available to permit participation by that parent in educational, social and political activities, for example, by securing substitute care for some portion of the day.

In countries such as Australia and the United States, the sub-group constituting households headed by female sole parents is the least likely to have adequate independent access to economic resources and is the most likely to rely, in whole or in part, upon welfare benefits in order to survive.⁷⁹ It is, however, inappropriate to specifically target this sub-group. The great majority of sole parents become such following the collapse of a marital or quasi-marital relationship or the death of a partner. Their disadvantage originates in those relationships and in the cultural expectations which have structured them. While, undeniably, disadvantage is exacerbated by the departure or death of a partner, particularly given our social history of inequitable division of resources upon dissolution and inadequate child support provisions, it is most often the consequence of earlier inequalities and not a discrete and isolated phenomenon. In that sense, it represents the by-product of our legal attention to the conditions under which exit is possible, and our total inattention to the conditions under which voice may be developed and sustained.

Under my proposal, in sole parent households the full rebate would be available to a working sole parent. Where sole parents are dependent upon other benefits or spousal support for their economic resources, the full rebate ought to be available as a supplement to other benefits (without diminution) provided that such parents enrolled at least half-time in an educational or training program designed to develop and enhance their capability to compete in the labour market, and thus to meet their obligation to provide economic support as well as nurturing. Despite the fact that it does not use family income as a criteria for eligibility, it does for these reasons seem likely that it would go some way towards meeting broader egalitarian

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In Australia, on current government statistics, approximately 70% of sole parents rely upon welfare for the bulk of their support and 95% of those pensioners are women. See *Women's Budget Statement*, *loc. cit.*, 208.

goals. Likewise, among less advantaged sections of the community, it is, in the non-ideal world, frequently necessary for all adult family members to work in order to secure an adequate standard of living for their families. Such families would be significantly benefited in that the full rebate would be available and the family would have the resources required to secure adequate care for children while endeavouring to meet its other economic needs overall.

In terms of its compatibility with Rawls' theory taken as a whole, particularly the principle that social and economic inequalities can be tolerated, in ideal theory, only if they are to the benefit of the least advantaged group and *attached to positions open to all under fair equality of opportunity*, I conclude that my proposal can be reconciled with Rawls' principles subject to a number of critical qualifications. First, as it stands, Rawls' theory places excessive reliance upon a number of conventional assumptions. These include, but are not necessarily limited to, his presumption that the position of representative individuals can be sufficiently defined in terms of equal citizenship and the individual's place in the distribution of income and wealth, his apparent assumption that this position can be ascertained by examining *household* rather than individual income and his stated position that other roles are voluntarily entered and thus need not be specifically addressed. Rawls identifies '*the least advantaged as those who have the lowest index of primary goods, when their prospects are viewed over a complete life*.'⁸⁰ Clearly, given the emphasis upon prospects over a complete life, and given Rawls' assumption that positions other than that of citizenship and that in the index of income and wealth are voluntarily assumed, a proposal giving social priority to the needs of mothers with young children becomes somewhat tendentious. While bearing and rearing children clearly imposes extremely high costs upon the great majority of women, costs which are not significantly shared by men, a theoretical focus upon the costs incurred by women in childrearing conflicts both with Rawls' emphasis upon household rather than individual income and with his view that other roles are voluntarily assumed. It makes a specific social role and one which has arisen at least in part as a consequence of a particular set of legal, economic, historic, and ideological conditions central. It challenges, at a fundamental level, the universality of his account. The economic disadvantage presently faced by women is a function of their socially and legally constructed roles as wives and mothers, and it is this set of historically contingent disadvantages which must be addressed. Prospects cannot be viewed in the abstract, apart from the social, normative and ideological considerations which give them shape and form, nor, for that matter, can factors such as motivation. In addition, implicit in my proposal is an assumption that individuals who did not know their gender or the gender roles characteristic of their society would recognize that all individuals, irrespective of gender, have an obligation to provide any children they may have with nurture and with economic support and would structure their institutions to facilitate this and ensure that none were disadvantaged thereby.

Economic institutions have long been structured in a way which suggests that worker and primary parent are mutually exclusive terms. To a substantial extent this remains the case. More precisely, the fact that a majority of men are also fathers has been and remains today irrelevant to institutional design. The responsibility of men for their children is perceived in a way which suggests that it is limited to the provision of resources and it is this assumption which must be challenged and eradicated. In a just society, one in which all opportunities, including the opportunity for full participation in parenting were opportunities open to by all, this would not be the case. It is a measure of the injustice which permeates the basic institutions of our society, in the full Rawlsian sense, that no social recognition has been given to the fact that the vast majority of adult individuals, male and female, are, have been, or will become parents and are, therefore, obligated to provide their children both with economic support and with care and nurture.⁸¹ In a just society, both parents would contribute approximately equally to the provision of support and the provision of care and nurture, and both would perceive their contributions in each sphere as being of equal value. In society as it exists today, it may be argued that the potential for motherhood and the cultural weight given the mother role colours the aspirations of girls and young women from childhood onwards, and is frequently a determining factor in directing their choices and modelling their career aspirations. The potential for fatherhood, as a responsibility demanding personal commitment and the gift of self rather than biological fact, on the other hand, continues to be marginal in the development and aspirations of men. Their real and significant work lies elsewhere, and in so far as fatherhood is relevant in shaping their aspirations, it is relevant in terms of their role as providers. Indeed, it is perhaps significant that, under present conditions, fatherhood as social practice often becomes most critical and significant to men upon dissolution of marriage, that is, when it comes to symbolize loss irrespective of prior active involvement in and personal commitment to parenting as a social practice.

Rawls' account strongly suggests that roles such as husband and wife and indeed parent are wholly voluntarily chosen, and, for that reason, irrelevant to distributive justice. It is as if gender were an afterthought, a preference which may be disregarded in assessing the justice of the basic structure. Despite this, gender and gender roles have played a critical role in the evolution and structure of social institutions, and their role is especially conspicuous in the internal structure of such institutions as '*competitive markets . . . and the monogamous family*' which Rawls identifies as basic.⁸² As Rawls acknowledges, it is to inequalities in institutions such as these that principles of social justice must first applied. Yet, given his propensity for viewing the family from the perspective of heads of family lines, given his blindness concerning the role of gender in structuring opportunities and disadvantages and his later, almost paradoxical, insistence that his principles are not intended to apply to institutions

81 On the costs of motherhood in Australia see *Women's Budget Statement*, *loc. cit.*, 76.

82 Rawls, *A Theory of Justice*, *loc. cit.*, 7.

such as the family, and given his resort to conventional economic accounts which render much of the work done by women, particularly mothers, irrelevant, one must conclude that he perceives gender roles, and the gendered family as peripheral to questions of the justice of the basic structure.⁸³ His description of such roles as voluntarily assumed irrespective of their social and economic consequences effectively prohibits the precise proposition for which I am arguing, that mothers with young children may be rationally identified as the least advantaged group, irrespective of the economic position of the household of which they are a part. While my presumption conflicts with Rawls' emphasis upon the household and particularly his view that the critical issue is the allocation of commodities to households,⁸⁴ it is consistent with contemporary social welfare statistics and the now widespread recognition that female sole parents are not only more likely to require transfer payments for survival than most other segments of the community but also less likely to better their economic position and escape the cycle of poverty. This, in turn follows from conventional family structures, the generally depressed wages available in 'typically female occupations' which have long been deemed appropriate in part because of assumptions concerning the family and family roles, and from the significant expenditures necessitated by the need to arrange substitute care for children. The real question is whether Rawls' theory is capable of acknowledging, at its foundation, the interpersonal obligations and responsibilities which might rationally be thought to follow from the basic facts of human existence once one adopted the appropriate perspective.

DWORKIN AND COMPLEX EQUALITY

What of Dworkin? On the ideal theory level, we confront a number of significant difficulties. His apparent acceptance of the standard economic allocation of human activities into work, leisure and consumption, his treatment of the concept of leisure as unworthy of analysis and argument, and his emphasis upon voluntariness and choice in the individual allocation of time to work or leisure seems also to make it difficult to reconcile his ideal theory account with the currently disadvantaged position of the mothers of young children. Indeed, on the ideal theory level families apparently do not exist, nor do, for that matter, any non-commercial relationships between individuals. On a non-ideal level, however, the position may be different. Dworkin has argued that, under non-ideal conditions, programs which produce what he has termed '*dominating improvements*' in equality are acceptable. According to Dworkin, taking the situation which would obtain if an egalitarian distribution of resources had occurred as the baseline, if a particular program reduces the overall disadvantage, both in

83 *Ibid.* Rawls assumes at pp. 7-8 that it is not necessary to consider the justice of institutions and social practices generally to address the justice of the basic structure taken as an interlocking network of discrete institutions. Rather, he is concerned with ensuring that the relationship between these institutions conforms to principles of justice. The issue of justice for women, however, requires that the internal justice of these institutions and practices be given primacy. A just society develops from the bottom up, not from the top down.

84 *Ibid.*, 276.

terms of available resources and the freedom to make use of those resources in ways which are personally satisfying, of some people without creating thereby a situation in which others have fewer resources and less freedom *than would be theirs under an ideal egalitarian distribution*, such programs are acceptable.⁸⁵ Under Dworkin's non-ideal criteria, Okin's program would, I think, fail, because it would reduce the overall resources of some individuals below those which they would have under an ideal egalitarian distribution. What of my argument? Presuming as I do that it would be, at least in part, funded by an increased and more steeply progressive income tax, could it be described as meeting the standards Dworkin argues are essential? If one accepts the propositions I have put forward, that under existing social and economic conditions, women are pervasively disadvantaged as a group and that these disadvantages are most overwhelming with respect to those women who are responsible for the care of children under the age of twelve, I believe it may, subject to these qualifications. I have argued that the disadvantages experienced by such women resound both in diminished access to resources and in diminished access to leisure. By leisure I mean that time available for discretionary use reflecting the preferences of the individual. Thus, I do not regard time required for child care and essential domestic tasks as leisure. I am, however, inclined to regard time allocated to non-essential household tasks as leisure. For women who have young families, in the real world, a number of options exist. They can devote themselves full time to the parental role, in which case their independent access to resources is likely to be minimal or non-existent, and their access to leisure equivalent to or less than that of their partners. They can attempt to balance economic activity and parenting, in which case the cost of replacement care for their children is likely to significantly reduce and, in some cases, nullify the gain from their economic activities and their available leisure is likely to be significantly reduced because they are likely to retain almost full responsibility for essential household labour and parenting. They can devote themselves full time to labour market activities, in which case their earnings are likely to reflect the gap between average male and female wages generally and to be further significantly diminished by the cost of securing appropriate care, and their leisure deficit is likely to approximate that of individuals without parenting responsibilities who work two full time jobs.

I shall argue further that it is proper to regard women's culturally assigned responsibility for parenting as a 'liberty deficit' in Dworkin's terms. The conception of a liberty deficit is introduced by Dworkin in the course of imagining what an ideal distribution in our world would look like and how we might move towards it. He argues that, in the real world, an individual's circumstances may be worse than justice demands in two quite different ways. He or she may be disadvantaged because of having fewer resources than would be available under an ideal distribution. Likewise, the baseline liberty/constraint system of the community might be unfair, depriving that individual unjustly of the ability to make full use of the resources which he or she does have. The distinction between these two distinct forms of

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Dworkin, 'The Place of Liberty', *loc. cit.*, 41 ff.

injustice involved follows from the fact that the value of different resources to any individual cannot be considered independently of any existing constraints on that individual's capacity to make use of those resources in ways which are personally satisfying. Thus, for example, the value of marble to any given individual may be altered if he or she is legally forbidden to use that marble for satiric sculptures. Likewise, different systems of baseline constraints have the capacity to alter the preferences of individuals and determine even those which would be expressed in an ideal theory auction. The distribution of resources and opportunities cannot be considered in isolation but must be evaluated against the background of the liberties and constraints within which choices are made and opportunities pursued. As a consequence, in the real world, it is necessary to consider two distinct foci of disadvantage. Not only may an individual not have the resources he or she would have been entitled to in an ideal egalitarian auction, but also the liberty/constraint baseline system currently in force might itself be unfair in some way, as it would be if, for example, certain forms of expression were prohibited by law. Any given individual may be doubly disadvantaged in that the liberty/constraint baseline system in the community might be unfair and he or she might have fewer resources than ought to have been the case even under that unfair system. According to Dworkin,

*someone's liberty deficit . . . is the degree to which he is limited, in what he is able to do or achieve, by some constraint, compared with what he would have been able to do or achieve in the position defined for him by an ideal egalitarian distribution.*⁸⁶

In our society, I would argue, women's culturally assigned responsibility for primary parenting together with their culturally assigned responsibility for domestic labour constrains what they are able to do or achieve in other spheres of life compared with the outcomes which would obtain following an ideal egalitarian distribution *in which responsibility for primary parenting and domestic labour was equally shared by men and women*. The knowledge of their potential responsibility in these areas, responsibilities which are not to any significant extent presently shared by men, significantly affects their preferences in education, in employment, and in the pursuit of economic, social and political opportunities. It follows that the preferences actually expressed by women have arisen at least in part as a consequence of the liberty/constraint baseline system existing in countries such as Australia, England and the United States, and are, to that extent inauthentic. They cannot be assumed to be equivalent to those which would be expressed under ideal egalitarian conditions.

It is for this reason that my account incorporates recognition of the potential impact of gender at the ideal theory level in equality of resources. By defining an egalitarian distribution as one in which male and female individuals shared responsibility for parenting and necessary domestic labour equally, it establishes a background constraint at the level of ideal theory, one which implicitly acknowledges morally binding obligations and

responsibilities.⁸⁷ Reasoning commences with two independent counterfactual assumptions in place. The first is that developed by Dworkin himself, that individuals are approximately equal in talent. The second acknowledges the potential obligation of all individuals to participate in domestic labour and parenting irrespective of biological sex. Once this second counterfactual assumption is in place, and we compare real world conditions with those at the ideal theory level, it becomes possible to recognize that the roles associated with gender in our culture do, in fact, impose a liberty deficit upon women. Women are, that is, constrained in what they are able to do or achieve in other spheres by their culturally assigned responsibility for parenting and household labour when we compare their present situation to that which would obtain if these responsibilities were equally shared by men and women. Men, on the other hand, appear to enjoy a liberty surplus in that they have, for the most part, been relieved of primary responsibility for parenting and household labour. Their choices are unconstrained by any personal responsibilities in that regard. I do not know whether Dworkin would find either my definition of leisure or my description of women's responsibility for primary parenting and household labour as a liberty deficit plausible. I would, however, argue that they must be so considered if his theory is to be understood gender neutral terms rather than as tacitly predicated upon the male gender role.

A further problem arises because the examples Dworkin provides to illuminate the concept of a liberty deficit invariably involve legal restrictions, and indeed, he emphasizes that a liberty deficit '*is a loss of power, in virtue of legal constraint,*' [emphasis mine] and argues that '*a community victimizes one of its members . . . when it imposes a liberty deficit on him.*'⁸⁸ It is not altogether clear that women's parental and domestic roles may be described as a loss of power arising from legal restraint in existing unjust societies.⁸⁹ They did, however, evolve to their present form at least in part as a consequence of legal constraints imposed by the common law. Those constraints were substantially continued and legally reinforced by traditional matrimonial regimes and they continue to exist in shadow form in contemporary regimes of family, taxation and social welfare law. Likewise, women's labour market participation today bears the scars of earlier legal regimes, under which married women were compelled to resign, under which female wages were significantly lower than male wages for equivalent work, and under which women were routinely denied entry into many forms of employment. Thus, by extension, it may be argued that women's present liberty deficit is in substantial part a consequence of earlier, incompletely relinquished legal constraints, and of the social mores and conventions these reinforced and *were intended to reinforce*. In that sense it is appropriate to describe women's culturally assigned responsibility for parenting and

87 I note here that the proposition for which I am arguing explicitly contradicts Dworkin's assertion that felt moral constraints are irrelevant to equality. *Ibid.*, 19.

88 *Ibid.*, 48.

89 Donzelot's work on soft policing seems relevant here. Generally see Donzelot, *loc. cit.*

domestic labour as a liberty deficit and to argue that women's present social and economic victimization ought properly to be described as the logical and probable consequence of our culture's earlier history of legal victimization.⁹⁰ My argument may be summarized thus. First, our present social, political and economic institutions are, in part, the creation of our legal institutions. They developed within the framework the legal regime made possible. Second, just as the legal abolition of slavery did not eradicate (or even significantly disturb) the social patterns of prejudice and disadvantage associated with it, so too the gradual legal enhancement of women's legal rights and the gradual removal of formal restrictions and movement towards greater equality of opportunity have not yet made significant inroads upon the social patterns which were constructed and reinforced by earlier legal regimes. I believe that it follows that, given our concrete legal and social history, it is proper to argue that women's parental and domestic roles and the social and legal construction which continues to be placed upon these roles constitute a significant 'liberty deficit' in Dworkin's terms. Another way of expressing this point is to insist that existing gender roles developed and were reinforced against the background of legal constraints which were differentiated by biological sex and marital status, that these roles, together with their economic, social and political consequences, form a significant part of the baseline system of liberties and constraints presently in force, and that the disadvantages presently experienced by a majority of women are a direct consequence of these constraints.

Dworkin, in developing the concept of a baseline system of liberties and constraints against which an ideal theory auction of resources is to be held, argues that any reasonable baseline would incorporate what he terms a 'principle of correction'.⁹¹ Under the principle of correction freedom of choice could properly be limited where this was necessary to compensate for externalities which would not exist in a hypothetical auction in which opportunity costs would be determined under conditions of perfect knowledge and costless organizational transactions. Dworkin comments in this context that

*constraints on freedom of choice are required and justified . . . if they improve the degree to which equality of resources secures its goal, which is to achieve a genuinely equal distribution measured by true opportunity costs.*⁹²

Thus zoning ordinances or other regulatory constraints, for example, are legitimated by the need for a principle of correction, in that they correct distortions in distribution which would not occur under conditions of perfect knowledge and costless organizational transactions.

⁹⁰ This, of course, offers an alternative rebuttal to Dworkin's insistence that only legal constraints are relevant to equality and to his dismissal of 'felt moral constraints' as special features of personality. See my discussion of moral constraints in Chs. 6, 10, & 11.

⁹¹ Dworkin, 'The Place of Liberty', *loc. cit.*, 29-34, esp. 31-34.

⁹² *Ibid.*, 32-33.

Likewise, he suggests, a legal stipulation that no single individual could acquire more than half the community's total supply of marble would be justified. While such could not be legitimated in an ideal egalitarian distribution, it would produce no liberty deficit in the real world, given that under an ideal distribution no single individual would possess the resources required to acquire such a supply.⁹³

Similarly, it might be argued that a 'principle of correction' could justify some of the constraints upon freedom of choice implicit in my proposal. For example, I have argued that the provision for parenting leave which forms an intrinsic part of my proposal should be non-transferable, six months leave being available to each parent. To a degree, such a provision implicitly constrains freedom of choice, in that neither parent would be entitled to take a full year of leave and no child care rebate would be available until a full year had passed unless a sole parent was involved. However, under an ideal distribution of resources, men and women would participate equally in socially necessary labour and in economic labour given that both have an obligation to care for their children and to secure the resources essential for survival. Thus, such a restriction represents an attempt to redistribute the opportunity costs implicit in family life and, at present, primarily borne by women, as they would have been distributed under conditions of perfect knowledge and authentic commitment to equality. Likewise, the requirement that sole parents participate at least half time either in employment or in programs enhancing their capacity to secure and sustain employment, while a restriction upon their freedom of choice, would not limit their options to a greater extent that would obtain under ideal conditions, given that all parents have an obligation to provide both care and support. Similar arguments may be put concerning the fact that the full rebate would only be available where both parents also participated in the labour market. Given that in a ideal world, the decision to bear children, while undoubtedly a choice, would represent a choice made equally by both parents,⁹⁴ and given that such a choice would be made in full knowledge of both opportunity costs and benefits, and that such would, so far as possible, be shared by both, such restrictions are appropriate. No individual would occupy a more disadvantaged position by virtue of such constraints than he or she would have occupied under ideal conditions in which resources were distributed against the background of an auction in which

93 *Ibid.*, 41.

94 Here, obviously, I am ignoring the disparities in power in our existing, non-ideal world, and ignoring the extent to which these disparities are enforced by laws such as those still on the books in many United States jurisdictions which guarantee the husband sexual access to his wife, and, in some states, *de facto*. Equally, I am ignoring imperfections in birth control methods which continue to result in a substantial number of 'unwanted' pregnancies. In an ideal world, perfect knowledge would ensure that the likelihood of pregnancy would be known and that the individuals concerned, in a world in which men and women were truly equal, would make a joint decision to have a family knowing that both the opportunity costs and the benefit would be equally shared.

the opportunity costs inherent in parenting were presumed to be equally shared. It follows that within a gender neutral version of Dworkin's framework no injustice is involved.

Am I arguing then that Dworkin's full account of the implications of equality of resources would *mandate* a program similar to that described? No, not necessarily. Two problems arise. First, as noted above, I have incorporated at the ideal theory level recognition that all parents have an equal obligation to provide both economic support and care and nurture for their children. Second, in what he has termed the '*real, real world*'⁹⁵ it seems likely that such a program would represent, not a decision compelled by principle, but a matter to be weighed along with conservation, football stadiums and opera houses, and working conditions and hours in the scales of social policy. It is one a government might legitimately adopt, that is, such a program is not proscribed by equality of resources, but its merits would fall to be assessed upon the same basis as other choice-sensitive issues. Whether or not such a program is appropriate apparently is an issue

*whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community.*⁹⁶
[Emphasis mine.]

As Dworkin argues, in a retrospective on the *Lochner*⁹⁷ decision, if the legislative restrictions on freedom of contract and hours of work overturned by the Supreme Court, had, in fact, cost immigrant workers their jobs, and if the state had made no compensating arrangements for alleviating unemployment, those workers were victimized by the statute and it follows that the court's decision was entirely appropriate. As he comments,

*it is wrong in principle for the state to deny people the right to work on terms they are willing to accept, in order to improve the economic situation of workers generally, unless it provides unemployment compensation or other relief for those who cannot obtain employment on the stipulated terms, relief sufficient to make their circumstances plausibly as good as holding a job under the outlawed terms.*⁹⁸

It is interesting to note that, under Dworkin's analysis, a slightly later Supreme Court decision, *Muller v Oregon*⁹⁹, would have clearly been improper. The court upheld protective legislation applying only to women which significantly impaired their capacity to compete on an equal basis in the marketplace on the grounds that work under prevailing market conditions

95 *Ibid.*, 173.

96 Dworkin, 'Political Equality', *loc. cit.*, 24.

97 *Lochner v New York* 198 U.S. 45 (1905).

98 Dworkin, 'The Place of Liberty', *loc. cit.*, 51.

99 208 U.S. 412 (1908).

it would impair their reproductive capacity. No compensatory programs were contemplated by the state of Oregon to redress the economic harms legitimated thereby, indeed, it was hoped by many of the legislation's proponents that it would *encourage* women to withdraw from the marketplace. Dworkin is not, of course, simply arguing that *Lochner* was rightly decided. Rather, he is arguing that social legislation such as that struck down by the Supreme Court in *Lochner* represents a policy decision and not a matter of principle, and that, as a consequence, the Supreme Court in *Lochner* intervened outside the scope of its powers, as properly understood. The court ought not have intervened absent a clear showing that the legislation failed to manifest equal concern for those disadvantaged by it.¹⁰⁰ Such issues, and by implication, the nature and content of all *positive programs of social reform* ought to be decided either directly by a referendum or indirectly through representatives elected by popular majorities.

What I find striking in Dworkin's analysis is the fact that positive social programs of the sort struck down in *Lochner* and upheld in *Muller* together with programs such as that proposed above epitomize choice-sensitive issues, programs whose *justice* (as opposed to integrity) depends upon the character and distribution of communal preferences. Given that he also argues that equality is a moral mandate, that government has an obligation to treat those it governs with equal concern, it is important to understand why that should be the case. Two reasons are, of course, apparent from his own analysis. First, given the distance real world communities have to travel to attain any sort of defensible egalitarian distribution, many different paths might reasonably be chosen in pursuit of equality. Each would have different consequences, and those effects would alter the field of play upon which future choices would be made.¹⁰¹ Likewise, we do not know the consequences any of these choices would have on individual preferences, indeed '*personalities and ambitions would change as any program tending toward equality unfolded.*'¹⁰² Progress towards a defensible distribution is inevitably partial, incremental and context sensitive, and these characteristics may be sufficient to ensure that the choice between different programs to ameliorate existing inequalities is necessarily a policy decision and therefore choice-sensitive.

In this context, it is, however, essential to recall the comments made by MacIntyre and discussed in Chapter 3. It is in the pragmatic world of choice-sensitive issues that the capacity to bargain becomes critical and it is this capacity that women and other disadvantaged groups have, both historically and at present, lacked. While background principles of equality clearly constrain the options open to the state, and prohibit direct or indirect discrimination against individuals or groups, the choice of options absent actual discrimination depends, not simply

100 Dworkin, 'The Place of Liberty', *loc. cit.*, 72-73.

101 *Ibid.*, 43-45

102 *Ibid.*, 43.

upon the principles themselves, but also and far more centrally upon the character and distribution of communal preferences and the accuracy with which the political process ascertains these. A great deal turns, therefore, upon understanding the role and structure of prejudice in gender issues and even more centrally, upon recognizing and insisting that even programs which apparently contain no unjust discrimination, which appear fully gender neutral in intent and content *may nonetheless constitute unjust discrimination within in a social context which is substantively ordered upon the basis of conventional gender roles and in which these have become normative.*

JUSTICE, WOMEN, AND THE REAL REAL WORLD

Throughout, it has been argued that the public/private distinction plays a critical role not only in the theoretical structure of liberalism but also in the ways in which the specific injustices which have arisen as part of the structural content of the feminine gender role have been excluded from contemporary ideal theory accounts of distributive justice. In this chapter, I have argued that a significant cost of this particular aspect of liberalism may be seen in the emphasis of legal regulation of marriage and divorce upon entry into marriage and exit from marriage. These aspects are fully public, a fact emphasized by the legal requirement for the public registration of marriages, the legal designation of appropriate marriage celebrants, and the public procedures essential for the dissolution of marriage. Accompanying this emphasis upon full public disclosure under contemporary Australian law have been the increasing efforts to define and identify the characteristics of *de facto* relationships, to ensure that such relationships may be publicly identified with a reasonable degree of certainty, and to assimilate their structure to formal marriages. Thus, entry and exit are likewise becoming public legal issues with respect to *de facto* relationships. Little, if any attention has been given to fostering and encouraging the conditions essential for the development of voice within such relationships, a fact which forms a significant contrast to the apparently increasing emphasis upon voice, and therefore individual empowerment, in commercial and quasi-commercial relationships. Within the commercial and quasi-commercial setting at least modest sensitivity to inequalities in bargaining power and the dangers of overreaching has become commonplace. Within the family, the possibility of such inequalities has been recognized only recently, and even today is reluctantly addressed. It seems reasonable to suggest that the emphasis upon redefining exit rights in the family context and the virtually total disregard of the conditions essential if voice is to be developed and sustained mirrors the distinction between public and private. From a public, liberal perspective, because such relationships have been relegated to the realm of private choice, the critical factor has become ensuring that exit is freely available should preferences change and individual ends be redefined. Earlier, of course, the emphasis had been upon limiting exit rights sufficiently to leave the status relationships believed to be inherent in marriage essentially undisturbed. In both, the emphasis upon entry and exit and the total disregard of voice emphasize the critical distinction between the public face of marriage in which legal regulation is both appropriate and critical, and the private face of

marriage in which direct intervention is inappropriate and such intervention as occurs operates through extra-legal agencies such as welfare agencies. While concern with and emphasis upon the conditions essential for voice to exist within the public sphere is the hallmark of egalitarian liberalism, no similar concern has yet been acknowledged to be appropriate within the private sphere.

In their very different ways, then, both Rawls and Dworkin emphasize that their egalitarianism is fundamentally public, intended to govern the public relationships between citizens as such, and is neither intended to significantly penetrate private relationships nor appropriate for them. In this chapter, I have attempted to evaluate two quite different proposals for enhancing the equality of women within the constraints of the theoretical constructions offered by Rawls and Dworkin. The first mandated a compulsory redistribution of one-half the earnings of a waged spouse to a non-waged spouse. On the theoretical level, the logic behind this redistribution was to attempt to ensure that negotiations within marriage concerning the allocation of resources and decisions related to their allocation began from a equal footing. The second did not attempt a compulsory redistribution between spouses, although some reallocation was implicit in the fact that it would supersede all existing rebates for dependents. Rather, it sought to recognize the economic value of child care and the opportunity costs implicit in providing care and to ensure that a parent providing such care was not wholly deprived of independent access to resources as a consequence of providing care. It sought not only to enhance voice within family relationships by attempting to level the playing field upon which internal negotiations occur, but also through associated structural programs, to encourage a more egalitarian distribution of household labour and market labour within households. The first proposal highlighted potentially contradictory elements within both theories and could not be reconciled with them. The second proposal apparently failed to comply with Rawls' theoretical requirement that all roles other than that of equal citizen and that in the distribution of income and wealth are voluntarily assumed and need not be considered in assessing the justice of the basic structure.

Dworkin's theory, on the other hand, offered the conceptual space to accommodate such a proposal, provided that certain critical terms such as leisure and liberty deficit were extended in ways which captured the social and institutional causes of women's pervasive inequality. Yet given this, another barrier appeared, one which is, I would argue, both central to the public/private distinction as it has developed within liberalism and central to the conceptual structure of egalitarian liberalism itself. Dworkin has recently argued that political programs ranging from those regulating wages and conditions in the workplace to those providing facilities represent policy decisions which, as a matter of justice, ought to be taken in ways which ensure that they reflect, as accurately as possible, the character and distribution of preferences within the political community. What he appears to be saying is, perhaps, best put as a series of simple, linked propositions. It is wrong for a government, which is obliged as a matter of political morality to treat its citizens with equal concern, to enact laws which restrict

individual liberty simply because the behaviour involved offends majoritarian morality or sensibilities. Likewise, governments ought to enact legislation proscribing racial and sexual discrimination in employment, in access to public facilities, in participation in public affairs. Acts of racial or sexual discrimination that treat some individuals as less worthy than others cannot be justified. As he argues,

The principle of independence speaks to both liberty and constraint. First, it checks the principle of correction by insisting that no baseline constraint can be justified as necessary to reach a result that would be reached in an auction with perfect knowledge and no organizational costs, if that result would be reached only because people's bids would reflect contempt or dislike for those who would be subject to or suffer disadvantage in virtue of the constraint. Next, it checks the principle of abstraction by endorsing baseline constraints necessary to protect people who are the objects of systematic prejudice from suffering any serious or pervasive disadvantage from that prejudice.¹⁰³ [He goes on to analogize prejudice to physical handicaps or lack of marketable skills and continues:] Just as some people are at a disadvantage because the tastes of others do not allow their services to command a premium in the market, so other people suffer because they belong to a race, or have other physical or other qualities, that a sizeable number of their fellow citizens dislike or for some other reason wish to avoid. True, though equality of resources is neutral about the tastes that impose the disadvantage in the first case, it condemns the attitudes that create disadvantage in the second. But that difference means only that we have more reason to try to reduce the inequality that springs from prejudice than from other sources.¹⁰⁴ [Emphasis mine.]

What Dworkin seems to be saying is that the disadvantages which stem from prejudice are unique and special in a way which other economic disadvantages do not share. While handicaps or limited skills limit the *capacity* of the individual to compete with others, disadvantages which are the consequence of deep rooted prejudices in a community which does not proscribe their expression *deny that individual the opportunity to even attempt to compete*. The wrong done such individuals is direct, personal and fundamental in a way which morally demands the intervention of a government dedicated to equal concern. Such issues, in Dworkin's language, are matters of principle.

What then can be said concerning those issues which are, in Dworkin's language, choice-sensitive issues, matters of social policy? How are they different? First, Dworkin appears to be arguing that choice-sensitive issues are exemplified by issues concerning the allocation of scarce resources within the political community. What we ought to be seeking is a defensible distribution of communal resources, given the limits imposed by what would be technically feasible and by the historic contingencies imposed by earlier decisions. A basic requirement for any defensible distribution for communities such as our own is that

103 *Ibid.*, 37.

104 *Ibid.*

*no one would be forbidden by law, in a defensible distribution, to use his resources in whatever way he chooses, except in so far as necessary to protect security or to correct for different sorts of auction or market imperfections.*¹⁰⁵

Prima facie, the proposal I have made, is in Dworkin's terms, a choice-sensitive issue, a decision concerning the allocation of scarce resources within the community in a way which, it is to be hoped, might gradually alter existing power relationships between men and women as well. While gender discrimination in countries such as the United States and Australia is not yet legally fully proscribed, let us imagine that it might be, at least in its overt forms, and re-evaluate my proposal as it might appear in that, rather better world than our own, a world which, at least, complied with the demands of principle.

I argued earlier, that, if the definition of leisure I advanced were accepted and if my arguments that women, by virtue of their roles in the household economy and the legal history which structured and supported those roles, suffered a liberty deficit were also accepted, my proposal was consistent with equality of resources. It would, that is, represent a defensible distribution, in that no individual would be made worse off than he or she would have been in an ideal egalitarian distribution. Given, as argued earlier, women's history generally of victimization by the legal traditions of our community, and given that the shadow of that victimization continues to colour present laws and judicial interpretations, the disadvantages and injustices faced by women would in many respects appear to be the consequence of lingering prejudice, making legal efforts to eradicate them a matter of principle in a society dedicated to equality. Yet, in subtle ways, prejudice seems an inadequate concept. Men and women characteristically live together in relationships of varying degrees of intimacy which are, to a greater or lesser extent, structured by obligations and expectations predicated upon accepted gender roles. One critical difference lies in their perceptions of their relationship to the domestic economy. Men tend to perceive the home as the locus of leisure, as a place where their needs for care and nurture will be met, and where their participation is voluntary, chosen by them rather than obligatory. Women, on the other hand, tend to perceive the home as a site of labour, not leisure. Their participation in the domestic economy is not seen as voluntary, but as predicated upon their responsibility for others, primarily their husbands and children. For women, leisure is that time which remains after they have met the needs of others and during which they may pursue activities which are neither related to market labour nor to the basic requirements of the domestic economy. Ideally, it represents time which is their own and during which they will not be called upon to fulfil their responsibilities to others. Second, men tend to perceive their family responsibilities as substantially fulfilled by their breadwinner role, and this perception often remains irrespective of whether or not their wives also participate in the labour market. Women, even where they participate in the labour market full time, are characteristically expected to also assume the majority of responsibility

for the domestic economy. A final distinction is also significant. Where the traditional breadwinner/homemaker roles still obtain, men none the less perceive their earnings as theirs. In particular, men frequently still perceive themselves as entitled to have the ultimate authority over major purchases and, in particular, control over discretionary income. In many cases, while a housewife may exercise control over housekeeping funds and may assume responsibility for paying routine family bills, her husband nevertheless determines the housekeeping which is appropriate and that sum which she may have available to her as her personal allowance.

Because of the role such differences play in individual conceptions of the good life, and because of the degree to which they are still perceived to be naturally or morally determined, they reflect the shadow of a more or less shared conventional morality, one which was, until very recently also enforced and legitimated by law¹⁰⁶, and one which is being called into question. Now what I am arguing here is that, to the extent that the disadvantages faced by women may be described as a consequence of prejudice, the stereotypes and 'obligations of role' which perpetuate those disadvantages arise out of traditions which are fundamental to our culture, traditions which have in the past and continue in the present to shape and constrain the substantive preferences expressed within the community. In some ways, therefore, the real question which must be addressed is what might be termed the 'private enforcement of morals' and the extent to which the state may actively intervene to either proscribe or ameliorate such. The authority and power which was formerly legitimated and enforced by the power of the state is today sustained by the cultural traditions and social inequalities which arose out of the interaction between the state and civil society and which persist today. It is, that is, sustained not only by the fact that women continue to have significantly less access to economic resources than do men of comparable education and ability, although this is surely significant, but also by the fact that many men perceive participation in the household economy on an equal footing as a wrongful deprivation of their rightful leisure and traditional authority.

In addressing the question of the enforcement of morals, and by that phrase Dworkin means enforcement through the criminal law, Dworkin argues that

equality of resources aims at neutrality in a different sense: it aims that the resources people have available, with which to pursue their plans or projects or way of life, be fixed by the costs of their having these to others, rather than by any collective judgment about the comparative importance of people or

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Some aspects of this shared morality are, of course, still legally reinforced. Taxation provisions such as a dependent spouse rebate and the restrictions upon the deductibility of wages paid to a spouse, particularly where the work undertaken can be characterized as a marital obligation, enforce aspects of this shared morality as do aspects of social welfare laws. Similarly, the continuing prevalence of the traditional mother role in structuring judicial discourse in custody and access decisions is also a part of this morality, as is the fact that, in many American jurisdictions, spousal rape is not yet recognized as criminal.

*comparative worth of projects or personal moralities. . . . The liberal account of opportunity costs. . . extends that version of neutrality to the social circumstances as well as the discrete resources different ways of life require for success. It allows each person's social requirements - the social setting he claims he needs in order successfully to pursue his chosen way of life - to be tested by asking how far these requirements can be satisfied within an egalitarian structure that measures their costs to others.*¹⁰⁷

It follows from this, Dworkin argues, that while equality of resources allows no legal constraints which can only be justified on the grounds of religion or personal morality,

the interests different groups have in the design of the social and cultural environment are accommodated because numbers will indeed count in the auction.

Those who crave a homogeneous religious or cultural environment, like those who desire a life of connoisseurship, will find that the environment which they desire, can, if those who share their views are sufficiently numerous, in part be created without the aid of the criminal law. Likewise, those holding minority views, be they religious, sexual or cultural, will find no guarantee of social requirements ideal for them. As Dworkin notes, *'their prospects too, and for the same reason, will depend on the opportunity costs to others, neutrally judged, of what they want.'*¹⁰⁸ While they will be protected against the danger that the criminal law will be invoked against them, their capacity to generate congenial social environments will, ultimately, depend upon the degree to which their preferences are shared.

I have argued above that while the restrictions which continue to prevail on the public roles appropriate for women and upon the opportunities abstractly available to them are clearly proscribed by Dworkin, as reflecting forms of prejudice untenable in a community governed by principle, other aspects of the disadvantages currently faced by women are difficult to address on conventional legal models, such as those proscribing discrimination in employment and housing. The basic structural cause of disadvantage in the case of women arises out of the content of gender roles which are normatively structured and determined within private communities such as the family, and, in many cases, still believed essential to the survival of these communities. While such roles have in the past been reinforced by law, the roles themselves comprise fundamental assumptions about the lives which it is proper for men and women to lead, and it is these assumptions which, I have argued ought to be called into question as a matter of justice. Our gender roles, like the sexual conduct deemed appropriate, are at once important elements in the conventional morality of the community and factors which ought to be irrelevant to our rights and obligations as citizens. As citizens, we lead a shadow life, devoid of gender and of sexual preferences. Discrimination on either ground

¹⁰⁷ Dworkin, 'The Place of Liberty', *loc. cit.*, 30-31.

¹⁰⁸ *Ibid.*

ought to be proscribed, because such discrimination is predicated upon consideration of characteristics irrelevant to our public lives and deems our lives less worthy than those of others.

Yet given that women's inequality is a consequence of the prevailing normative ordering of private communities and the roles believed appropriate within these communities, how can or ought it be recognized and addressed by a community of citizens? Both Okin's proposal and that I have put forward identify a particular biological fact and the associated set of social facts as a major source of social and economic inequality within the community as a whole. Indeed, I believe it correct to say that women, as a group, are today truly equal only with respect to basic political guarantees. With Rawls, I accept that morally arbitrary characteristics, including biological sex, can be neither just nor unjust. Whatever justice or injustice results from such characteristics lies in the social use made of them, in the way social arrangements are structured. In communities such as our own, the social use made of biological sex is embodied in prevailing gender roles. Ultimately that is the only meaning which can, on a theoretical level, be given to a concept such as gender roles. They are a social construct which makes use of the biological facts of human existence and gives these facts their social meaning. They are, in that way, very like other social constructs such as citizen or person or, indeed, Native American or Black. Where, I believe, both Okin and I part company with Rawls and Dworkin, lies in arguing that the conventional distinction between public and private has the consequence of concealing the failures in justice which arise as a consequence of gender roles. To the extent that, with Rawls, such roles are assumed to be a matter of individual choice, the injustice implicit in our social use of these roles is obliterated. Likewise, with Dworkin, to the extent that remedial programs which seek both to eradicate some of the disadvantages inherent in these roles and equally seek to gradually alter their perceived necessity and hence their social construction can be deemed choice-sensitive, and therefore deemed issues which, *as a matter of justice*, ought to be determined in a way which accurately reflects the preferences of the community, *preferences which, to a substantial extent, have not only been shaped by those roles but also which implicitly perceive them as normatively appropriate*, this injustice is likewise concealed. The prevailing allocation of gender roles as it exists in Australia or the United States today may reflect the preferences of many individuals within the community at large. Indeed, given the degree to which these roles are culturally embedded, it seems likely that it presently does, although this may gradually be changing. At least in the United States, and perhaps in Australia as well, a majority of community members likewise would prefer a ban upon pornography and the continuation or reintroduction of capital punishment, yet Dworkin argues that both are proscribed by principle *irrespective of the distribution of preferences within the community*.

Where then does the difference lie? Dworkin, in company with other liberals, perceives the criminal law as uniquely invasive, as publicly denying the individual subject to its force membership in a community of equals, and this is nowhere more true than when it is

invoked to enforce the conventional morality of the community as is the case with bans on pornographic material or proscriptions against homosexual conduct. Curiously, Dworkin, in company with many other egalitarians seemingly does not perceive other bodies of law such as taxation law or family law as invasive in quite the same way, perhaps because the liberty of the individual does not seem to be at stake. Indeed, Dworkin argues that the taxation law ought to be used as the primary redistributive mechanism. Where individual liberty is not being obviously restricted by law, as in taxation laws where the individual remains 'free' to use that which is not taxed as he or she sees fit, and where conventional morality is, at most, being obliquely reinforced by legal provisions which seem not to restrict individual freedom of choice, but merely acknowledge prevailing social mores as in the deductions presently available for dependents, the coercive element recedes in significance and change itself seems invasive. To go beyond the lifting of restrictions and the affirmation of choice and implement programs which either reject some aspects of our conventional morality, as with Okin's, or which attempt to alter existing preferences by offering incentives to structure private relationships differently, seem also to restrict private freedoms, indeed restrict them in ways with potentially far greater community impact than a ban on pornography or homosexual conduct. Far more ordinary men and women are likely to enter marital or quasi-marital relationships and to bear children and raise a family than are likely ever to be affected by the criminalisation of pornography or homosexual conduct. Programs which seek to alter aspects of the structure of such relationships and the prevailing structure of family roles seem particularly invasive, perhaps because the family seems uniquely private and personal. Paradoxically, of course, if such programs did in fact reflect community preferences, there would be little need for them. If a majority of families were structured in a way which implemented equality of resources, if men and women in such families did in fact participate equally in market and household labour, if they perceived themselves as equally responsible for providing care and nurture and economic support, the question would not be one of securing distributive justice but one of ensuring that the law accurately reflected the preferences and the lives of the community as a whole. Unfortunately, there is little evidence that families are structured in this way. In other areas, the fact that the community as a whole prefers injustice, prefers to continue in conventional, albeit unjust ways, is precisely the reason Dworkin argues that prohibitions upon racial discrimination and capital punishment ought to be put in place, as a matter of principle, irrespective of the preferences of the community. In those communities where such reforms are most urgently needed, they conflict with majority preferences rather than embody them. The difference is clearly not simply a distinction between, let us say, overt sexual discrimination in employment or political rights and racial discrimination in the same areas. Nor is the distinction one which can be neatly captured as a difference, let us say, between discrimination in employment or education, and discrimination in other areas, even where reinforced by law. The distinction appears to lie in part at least in the distinction between regulation of and invasion into. It is permissible, even mandatory, to regulate the conditions under which families may be formed and dissolved. It becomes difficult to alter the social and

economic relationships which obtain within them unless the intervention clearly reflects the preferences of the community. Thus, for example, the introduction of no fault divorce law in California was widely touted by conservatives and liberals alike as enhancing family stability and fostering the conditions under which family life would accurately reflect the preferences of individuals. The change from the fault system to a no fault divorce at will system removed existing bars on the dissolution of marriage, bars which were widely flouted, and thus might be seen to reflect a general demand for a more equitable system, one which did not encourage subterfuge and mockery of the judicial process. The sorts of reform advocated by Okin and myself strike closer to home.

The central issue is not, I believe, that they are in fact more interventionist with respect to the family and family autonomy than many existing legal provisions which are widely accepted, such as the rebate for a dependent spouse and, in the United States, for children. Nor are they more interventionist than proposals which are widely discussed, such as income splitting for the purposes of taxation only. The dependent spouse rebate rewards and reinforces traditional perceptions of appropriate family structure while income splitting is intended to encourage and support traditional family arrangements by providing taxation advantages to such families. Neither, as presently structured, attempts to redistribute resources within the family itself. The proposals discussed in this chapter attempt to modify existing economic relationships within the family and thereby gradually alter other perceptions concerning family roles. Okin's proposal, for example, conflicts fundamentally with the widely held belief that a person's earnings belong to that person and may be used as he or she prefers, a perception acknowledged even by Dworkin who makes exceptions only for those funds required for security or to mitigate market imperfections.¹⁰⁹ Here, of course, it is critical to ask whether women's currently disadvantaged position is primarily a market imperfection, which in part it surely is, or whether it is primarily a function of the way in which our society allocates socially necessary labour and market labour and our cultural isolation of work and home. Mandatory splitting, as Okin suggests, iterates a belief that we almost certainly do not, as a community hold, that women's household and parenting labour is equivalent in value to men's market labour. Instead, as a community, we regard household labour and market labour as incommensurable. To the extent that we, as a community, do believe that women's household and parenting labour is equivalent in value to men's market labour, we divorce value and money - leaving husbands in possession of the money and wives, if they are fortunate, with praise and responsibility but no legally recognized entitlement to economic resources. We fall back upon the culturally entrenched belief that the value of women's 'contribution' as wives and mothers cannot be measured in monetary terms. If, as a community we actually believed that women's household labour entitled them to an equal

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Dworkin comments that '*no one would be forbidden by law, in a defensible distribution, to use his resources in whatever way he chooses except in so far as necessary to protect security or to correct for different sorts of auction or market imperfections.*' See 'The Place of Liberty', *loc. cit.*, 44-45.

share of family resources and an equal role in decision making, sociological evidence would not emphasize that women's participation in economic decision making and overall power within the household increases, often significantly, as they move into the labour market and as their earning capacity increases. Similarly, if the argument implicit in my proposal were, in fact, part of the existing normative structure of the community, men would already share equally in responsibility for domestic labour and parenting and would perceive themselves as disadvantaged if they did not and women would already share equally in market labour and responsibility for the provision of economic resources to the household and regard their responsibility in this regard as equally central to their role as parent. Because this is not in fact the case, because efforts to alter the prevailing gendered division of labour are perceived as threatening by many, and threatening in much the same way as legal availability of pornographic materials or the removal of legal proscriptions on homosexual conduct, it is clear that the real conflict is between the egalitarian aspirations of contemporary theory and the normative structures of the communities within the pluralist nation state, structures which interact significantly with religious beliefs and cultural traditions. Likewise, because suggestions that economic institutions ought to be substantially restructured to facilitate parenting by both men and women are still thought radical, because significant communal institutions remain structured around the presumption that their participants can rely upon the services of others in complying with employment demands, I conclude these norms are institutionally imbedded and reflect, not the separation of public and private as is often thought, but their interdependence. This normative and institutional structure was readily accounted for within the framework of classic social contract theory. The model of consent, binding individuals into hierarchically structured families and families through the social contract into the state provided a tight, but normatively vacuous structure, which because of its moral emptiness, could accommodate diversity and difference among the micro-communities of which the state was comprised.¹¹⁰ So long as consent held the key, and the circumstances of that consent were almost irrelevant, formal equality and liberty could be reconciled within one overarching grand theory.

Egalitarian liberalism poses a very different problem. Consent is no longer critical, even within a theoretical structure with intimate links to the social contract tradition. The fact of consent no longer legitimates structures which, absent that element, would readily be perceived as inequitable. Likewise, with the extension of equality beyond the merely formal the problem resolved by classic social contract theory reemerges. First, liberty and substantive equality must be reconciled within a theoretical structure which holds them in equilibrium whether the avenue chosen is through arguing that liberty, properly understood is an essential element in equality, or whether liberty holds pride of place in an egalitarian distribution. Second, given the fact that consent has lost its theoretical power to legitimate relationships which are otherwise unjust, given, that is, the emergence of theoretical structures which are no

longer normatively vacuous, a new way must be found to accommodate diversity and difference. The identification of the normatively laden structures of egalitarian liberalism as political accounts, the abolition of the earlier attempt to construct political theory within the framework of an overarching moral theory, represents the vanguard of this attempt, together with its fundamental theoretical construct, the citizen.

I have, throughout, argued that the conception of the citizen upon which both Rawls and Dworkin rely is significantly gendered. Just as the basic human needs identified by Rawls as primary incorporate no recognition of the impact of responsibility for children upon the distribution of resources, the model of equality of resources adopted by Dworkin assumes labour market participation as the norm and offers no direct avenue for valuing parenting and necessary domestic labour. If, however, we excise the elements which are typical of the male gender role of late capitalism and substitute a model which is androgynous in character and which incorporates recognition of certain fundamental individual obligations further problems emerge. The issue of distributive justice at once expands significantly and in ways perhaps unforeseen, because it becomes clear that the social distribution of resources and opportunities cannot be isolated from the social distribution of responsibilities. Both Rawls and Dworkin suggest that distributive justice can most appropriately be addressed through the taxation system - either, in the case of Rawls, through a consumption tax, or, in the case of Dworkin, a progressive income tax, possibly in practice combined with other conventional avenues such as inheritance and gift taxes. On an androgynous model, however, it becomes essential to question the prevailing gendered distribution of labour within both the family and the community, the social construction and allocation of leisure, again within both the family and the community, and the interaction of both with prevailing institutional structures. Given the interaction of these with wider normative structures, and, particularly given the profound significance of such issues within many of the more or less comprehensive moral theories prevailing in contemporary societies, intervention is likely to be perceived as a direct attack upon the values of many smaller communities. While both Rawls and Dworkin make it clear that comprehensive theories which cannot be reconciled with liberalism have no place within the just community, and Rawls offers as illustrations

*a conception of the good requiring the repression or degradation of certain persons on, say, racial, ethnic, or perfectionist grounds or a religion which can survive only if it controls the machinery of the state and is able to practice effective intolerance*¹¹¹,

while Dworkin emphasizes that racial discrimination and capital punishment are wrong in principle and ought to be proscribed, both apparently assume that the majority of conceptions of the good life presently prevailing within liberal democracies can be reconciled with the basic tenets of political liberalism. Two avenues are primarily relied upon to accomplish this. First,

¹¹¹ Rawls, 'The Priority of Right and Ideas of the Good', *loc. cit.*, 265.

Rawls and Dworkin rely upon the supposition that roles other than that of citizen and those in the distribution of income or wealth are somehow voluntary or chosen. Such roles affirm individual choice and thus affirm diversity and difference. Second, for both theorists, the pragmatic real world decisions involved in addressing economic injustice are policy decisions and ideally reflect the priorities and preferences of the community. Many different concrete programs have the capacity to address different aspects of economic injustice, and the choice of an appropriate approach depends upon the existing social and economic setting.

Social policy decisions ought to be tested against background principles of equality, are constrained by such principles, but the choice of particular policies, the decision to address one aspect of equality rather than another, to direct resources to one project rather than another, particularly for Dworkin, ought as a matter of justice, accurately reflect community preferences. This distinction is absolutely critical. At the simplest level, it emphasizes the distinction between the use of state power to impose the preferences of the majority upon dissident individuals or groups, as would be the case if pornography or homosexual conduct were legally proscribed, and the allocation of resources to benefit one segment of the community rather than another. On a second, related level, it emphasizes the role of the state in ensuring that basic institutions such as the marketplace, the education system, and the agencies of the state will not deny to any individual the opportunity to compete as an equal because of arbitrary characteristics such as race, religion or biological sex. Where, however, the line between arbitrary characteristics and social roles is blurred, and it becomes possible to argue that the real issue involves lifestyle choices and the complaint of injustice may be perceived as discontent with the consequences attending a particular, voluntarily chosen lifestyle, the perception is very different.

Inequalities which arise from gender and from gender roles are, in a sense, unique. There are several reasons for this. First, unlike race, for example, aspects of such roles are conventionally thought to be voluntarily chosen. Thus it may seem that women elect to conform to the norms surrounding motherhood in our culture or that they consciously adopt conventionally feminine behaviour. Similarly, many men pursue vocations and avocations which epitomize prevailing conceptions of masculinity. Thus men and women may appear to have chosen to comply with the demands of gender roles, to have constructed their identity around these roles. Given the normative weight that gender roles carry, departure from them is often perceived as the deliberate flouting of culturally significant norms. Indeed, women who choose to reject the prevailing cultural image of femininity are often perceived as posing a social threat in much the same way as are homosexuals. They can be seen, that is, as deviants. Because gender permeates every institution within the community, and gender roles have their genesis within the family, gender norms seem, to many people, an absolutely fundamental way of structuring our perceptions of others and our relationships to them. They play a central role in the more or less comprehensive moral theories held by diverse micro-communities, in their beliefs concerning family, concerning the allocation of authority and responsibility. Questions

of gender arise in all known human communities. Even religious communities dedicated to celibacy are defined and constructed against the backdrop of gender and gender norms. Gender difference is both inclusive and exclusive. It forms a substratum underlying all of our relationships with others, particularly our most intimate relationships. Gender inequality cannot be addressed adequately on a macro-institutional level, because macro-institutional reforms are likely to remain ineffective unless they are accompanied both by structural alterations which seek to eradicate the impact of gender and by micro-institutional reforms, particularly within the family, structured to encourage gender role redefinition and equal participation by both men and women in the life and work of the family and the wider community. So long as opportunities remain structured around gender norms, and the gendered structure of the family reaffirms those norms as valid, the gradual eradication of discrimination against women is likely to be replaced by an almost fatalistic acceptance of the inability of most women to compete on an equal footing with most men. The focus returns to deficiencies in women themselves and what is disregarded, crucially, is the social allocation of responsibilities. The male norm is thereby affirmed.

Ought issues of gender justice then, be perceived as choice-insensitive, to use Dworkin's terminology? Consider the argument I have put that, in an ideal egalitarian distribution, men and women would share equally in household labour and parenting just as they would share equally in market labour and the provision of resources, and that, to the extent to which this has not been realized, women in general suffer a profound and pervasive liberty deficit and are, therefore, victimized by the community at large. Does it matter that prevailing social and economic disadvantages are inextricably linked to attitudes concerning appropriate roles for men and women, that many in the community still believe that women ought properly be dependent on their husbands for economic support and that masculine authority within marriage ought not be questioned, and further, that many believe that such practices manifest equal concern for women as individuals? Does it matter that women have undeniably participated in sustaining these roles? These are, without doubt, attitudes liberalism must condemn if it is to live up to its egalitarian ambitions. If my arguments earlier in this chapter are accepted, if women have been victimized in the past by attitudes such as these and this victimization has continued into the present, surely it is the fact of victimization which is critical and not the sincerity of the beliefs held by those who might perpetuate it. How might the state act to eliminate such victimization, which it undeniably played a part in establishing and sustaining? I have already suggested some of the structural reforms necessary - parenting leave, the establishment of a family track in employment for both men and women during those years when their children are young, job sharing, career-track part-time employment, elimination of the dependent spouse rebate and related benefits and their replacement with a child care rebate. These are positive programs, programs designed to combat prevailing social attitudes and the disadvantages which flow from them and which are disproportionately born by women. They do not simply prohibit certain courses of action but mandate programs which are required because, given the existing distribution of social

attitudes, they would not otherwise be undertaken. Undeniably, such programs would be perceived by those compelled to take action as coercive. They are, however, neither more nor less coercive than the legal proscription of racial discrimination. They appear more coercive and more interventionist because they mandate positive action and institutional restructuring rather than simply eliminating one or more options. Ceasing to act in a particular way is always easier and more practical than initiating new programs and structures, particularly those which are designed to alter the *status quo*.

At the present time, employment opportunities can, for the most part, be structured in a way which simultaneously institutionalizes gender roles in the opportunity structure and disregards family responsibilities and needs, even where laws prohibiting sexual discrimination are in place. Opportunities defined as masculine within prevailing institutions generally continue to be structured upon the assumption that the family responsibilities of workers can be disregarded in pursuit of institutional goals. Opportunities defined as feminine continue to be structured around the assumption that women may be employed more cheaply, that they are generally less reliable as employees, that they are not interested in advancement, and that their attachment to the workforce will remain marginal. Institutional structures both reinforce gender roles within families and are reinforced by them. In families in which, even where both adults participate in the labour market, substantial disparities in earning capacity exist, it is often economically irrational for the higher earning partner to restrict earning capability to participate more actively in family life. It is more efficient, more likely to maximize the overall economic position of the family, for the lower earning partner to make the adjustments which are necessary, thus increasing the vulnerability of that partner and minimizing the likelihood that the relationship will be fully egalitarian. Likewise, the fact that the lower earning partner is more likely to need time off from work to meet family responsibilities both reinforces the perception that women are less reliable as employees and identifies her in particular as one whose attachment to the workforce is marginal, thus perpetuating the cycle of disadvantage. Disparities in income earning capacity are likely to reinforce power disparities within the relationship in other spheres, and to place that individual at risk, both decreasing her voice within the relationship and making exit substantially more costly for her.

If, as argued above, such disadvantages flow from inequalitarian attitudes, attitudes which are culturally embedded in communities such as our own, and if, as argued throughout, legal reforms alone will prove inadequate unless and until they can be structured in a way which compels the implementation of major institutional reforms, are we dealing with a matter of principle or are we dealing with a question of social policy? Or, perhaps, are the terms themselves inadequate or inappropriate for the task at hand? Why does Dworkin, for example, perceive the criminal law as uniquely invasive? Why is the 'harm' which flows from a ban on pornographic material or homosexual conduct perceived to deny equal concern to those affected by it? Why are such 'harms' any more invasive or destructive of equal concern than, for example, the administrative procedures characteristic of the social welfare state, the

legal construction of, for example, appropriate marital relationships through the taxation system and taxation boards of appeal, the identification of marriage like relationships and the imposition of many of the consequences of legal marriage through the social welfare system or the courts? Does the difference lie in the fact that the criminal law is 'authentically legal' whereas the administrative procedures characteristic of the modern nation state are discretionary, enforced through broad administrative guide-lines? Can it simply be attributed to a distinction between prohibitive and facultative legal provisions?

The real difference lies in the distinction between bodies of law which may be construed in part as conferring benefits or facilitating private activity, despite the presence of penal provisions, and those which definitively prohibit certain courses of action but confer no benefits. If I am correct in this, it offers another way of accounting for the distinction between issues which are choice-sensitive and those which are choice-insensitive. Choice-sensitive issues are those which direct resources towards certain goals and projects while directing resources away from other goals and projects. Broad communal goals such as increases in industrial productivity, reductions in unemployment or increased defence capability are typical choice-sensitive issues. They represent a choice, given moderate scarcity, and ought to be taken in the interests of the community as a whole. The interests of the community as a whole in turn can only be ascertained through the expression of preferences. In such issues, what is critical is the accurate determination of preferences within the community. A real problem arises in moderately unjust communities such as our own. Preferences arise within particular social contexts and against the background of available opportunities, social, cultural and religious traditions, and are, at least in part, determined by those background conditions. To the extent that existing societies are unjust, to the extent that the benefits of social cooperation are unfairly distributed, and to the extent that cultural and legal traditions deem this appropriate, the preferences within these communities inevitably reflect and perpetuate existing forms of injustice. Change, particularly change involving core elements and practices, becomes threatening.

Thus, for example, a redistributive program such as that proposed by Okin might well be perceived as profoundly threatening. First, to the extent that existing family relationships are inequalitarian, a redistribution of this form would be perceived as an attack upon the self-worth of those men who perceive the breadwinner role, together with the control of resources and decision making available within it, as uniquely validating their masculinity. Similarly, in those families whose structures are most unjust, many women might perceive a direct redistribution of this sort as endangering their physical safety. To the extent that this was feared, the benefit of such redistribution might well be nullified by their desire to keep the peace precisely because women have traditionally been deemed responsible for sustaining human relationships. Similar problems might well attend a less radical alternative, that of simply remitting the existing dependent spouse rebate to the spouse rather than the breadwinner. Likewise, the child care rebate I have proposed, together with the accompanying

structural changes essential might appear threatening precisely because it endeavours to enhance the options open to women with young families and also provide them with a measure of economic independence. Many men, and some women, perceive even modest economic independence for women as attacking the foundation of the family relationship. While opposition to such programs might simply reflect a communal belief that alternative goals such as enhancing productivity are more important, it might also reflect the preference of the community that existing relationships between men and women not be disturbed.

Given that, as shown earlier, existing legal structures remain in large part inequalitarian in that they tacitly assume conventional gender roles and allocate the benefits of social cooperation in accord with the normative assumptions governing these roles, and given the fact that this is primarily accomplished, not through direct discrimination against women but through inequalitarian and often inconsistent assumptions embedded in the structure of the taxation and social welfare systems and the structure of family law, what remains to be said? First, for the most part, neither taxation law nor social welfare law overtly discriminates against women. Precisely the same assumptions govern those (rare) households in which the primary breadwinner is female as apply to the situation in which the primary breadwinner is male. Similarly, the *Family Law Act* is drafted in wholly gender neutral terms and explicitly authorizes the courts to consider a person's contribution as a homemaker and parent in property distribution upon dissolution. Questions concerning custody and access likewise ought to be determined solely by reference to the best interests of the child, and not by assumptions concerning gender roles. In actual decision making, however, the interests of the child are constructed against the background of appropriate gender roles and assumptions concerning 'normal' male and female behaviour just as decisions concerning property continue to be constructed against the background of assumptions concerning ownership. Difficulty arises because of the role played by these background attitudes in interpretation and decision-making. Similarly, the historic reluctance of the Family Court to award meaningful levels of child support and spousal support, as well as the continuing debate over the appropriateness and level of spousal support, reflects, not the formal structure of the legislation itself, but the continuing communal and judicial affirmation of the entitlement of the husband to his earnings and the reluctance of the courts to deprive him of that to which his labour entitles him together with the concrete legislative intent that financial relations between the spouses ought to be finally determined. The inequality lies in communal adherence to two discrete beliefs and the interaction of these: first, that every individual is entitled to the fruits of his labour (and here labour clearly means wage-earning activity), and second, that a dependent spouse is not entitled to any reward for household labour, including parenting labour, beyond that which the employed spouse elects to make available. Homemaking responsibilities, and even support services directly related to the income earning activities of the working spouse are deemed obligations associated with the married state, not work for financial gain.

The critical point is this. To the extent that inegalitarian attitudes remain normative within the community at large, even laws which are on their face wholly gender neutral have the capacity to reinforce prevailing gender norms and are likely to be interpreted in ways which facilitate this. The inegalitarian attitudes thus indirectly reinforced are, of course, those which egalitarian liberalism condemns. However, the most significantly inegalitarian aspects of each of the bodies of law examined may simultaneously be interpreted as policies directed at wider social goals, goals which are not necessarily, in and of themselves, objectionable and do not necessarily conflict with equality. For example, the taxation policies discussed above may also be interpreted simply as recognition that families containing dependents have a greater need for resources and that this need ought to be recognized, particularly against the background of equal pay for equal work. The existing rebate system may simply have been adopted as the simplest and most cost efficient way of implementing this. The reluctance of the taxation system allow deductions for the labour of an otherwise unwaged spouse on behalf of the income earning activities of the waged spouse may quite plausibly be interpreted as a means of ensuring that the state is not fraudulently deprived of revenue, as an effort to eliminate the moral hazard implicit in recognition. The failure to allow a rebate or deduction for child care may be predicated upon the assumption that it is in the best interests of young children that they be cared for within their own homes by one of their own parents. The critical point is that these and similar interpretations are available and plausible and cease to be plausible only when we acknowledge that, irrespective of the gender neutral framework of the legislation, the dependent spouse is in fact a dependent wife, that her access to funds continues to depend upon what her husband elects to make available, and that disallowing a deduction for child care serves as a concrete disincentive to many women, including sole parents, who might otherwise enter the labour market, simply because it decreases the economic utility to be derived from employment, sometimes to the point where, after all expenses connected with employment are taken into account, no worthwhile economic gain is realized. In a community in which genuine role sharing existed, in which men and women were equally likely to participate in economic activity and equally likely to be for some periods of their lives dependent upon the waged labour of another, these measures would not necessarily be inegalitarian. In our community, in which, until very recently, women have been perceived as properly dependent, in which they were presumed and from time to time compelled to cease employment upon marriage, and in which women are culturally assigned effectively sole responsibility for household labour and parenting, thus imposing a double burden upon those who do attempt to sustain labour market participation, the position is very different. Measures such as these are inegalitarian because they effectively operate to reinforce existing inequalities and make it more difficult for them to be overcome.

CODA

The real question to be answered is that explored throughout this chapter. Does egalitarian liberalism remain recognizably liberal if assumptions concerning social

responsibilities are incorporated at the level of ideal theory? I have argued that, with regard to Rawls, that individuals who were unaware of their biological sex and of the specific gender roles characteristic of their culture would necessarily assume that they might, at some point during their lives, have children, that they would recognize that all parents are obliged to provide their children with both economic support and care and nurture, and that they would as a consequence seek to structure all their institutions in a way which would ensure that these basic social responsibilities were fairly shared. Likewise, I have argued that Dworkin's account of equality of resources is incomplete unless it incorporates an account of equality of responsibilities. Thus, his castaways would be compelled to recognize that equality of resources, even on the ideal theory level, could not be attained without building in an assumption that most individuals are likely to become parents and as part of their overall commitment to equality would wish to ensure that the obligations inherent in parenthood did not affect their entitlement to an equal share of economic resources.

ADD WOMEN AND STIR: RAWLS AND OBLIGATIONS

In attempting to ascertain the effect of incorporating, even in abstract form, recognition of the costs and obligations of parenthood in Rawls' account, we must return to the original position and the reasons why it took the form it did. In discussing the veil of ignorance and the necessity for it Rawls comments that

the original position, as described, incorporates pure procedural justice at the highest level. This means that whatever principles the parties select from the list of alternative conceptions presented to them are just. Put another way, the outcome of the original position defines, let us say, the appropriate principles of justice. This contrasts with perfect procedural justice, where there is an independent and already given criterion of what is just¹¹² and where a procedure exists to ensure a result that satisfies this standard.

Rawls argues that an important reason for modelling the original position to incorporate pure procedural justice is that this enables us to explain how the parties may be conceived as autonomous. He continues:

Pure procedural justice in the original position allows that in their deliberations the parties are not required to apply, nor are they bound by, any antecedently given principles of right and justice. Or, put another way, there exists no standpoint external to the parties' own perspective from which they are constrained by prior and independent principles in questions of justice that arise among them as members of one society.¹¹³

I have argued that, even behind the veil of ignorance, the parties must be aware of the basic biological and social requirements for the reproduction of the species, and that, given

¹¹² Rawls, 'Kantian Constructivism in Moral Theory', *loc. cit.*, 523.

¹¹³ *Ibid.*, 523-524.

their awareness of these requirements they would seek to ensure that any responsibilities they might find they had to their descendants would not in any way prejudice their access to a fair share of the benefits of social cooperation. Does this recognition, in and of itself, suggest that the parties are constrained by '*prior and independent principles*'? No, what I am arguing is that the parties themselves must, behind the veil of ignorance, acknowledge the basic biological and social requirements for human reproduction, that their understanding of these facts is necessarily relevant to the principles which they choose, and must be reflected in their choice. To the extent that the basic biological and social facts of reproduction imply that each generation will find it essential to provide for the material, social and emotional well being of its immediate descendants, I believe that it also follows that the deliberations of the parties will reflect their knowledge of these facts and *their recognition of the obligations which flow from them*. Rawls himself, in characterizing a well-ordered society, emphasizes that

*its members view their common polity as extending backward and forward in time over generations, and they strive to reproduce themselves, and their cultural and social life in perpetuity, . . . for all are born into it to lead a complete life.*¹¹⁴

It surely follows from this recognition that, even behind the veil of ignorance, those who seek to define principles of justice suitable for regulating the affairs of a well-ordered society must be aware that the basic requirements of social reproduction will need, in some way, to be provided for and that the specific means chosen to realize this are likely to affect, perhaps significantly, access to the primary goods as defined. However one phrases this recognition, surely it implies that all individuals (given that behind the veil of ignorance they are unaware of both their biological sex and their social gender) would assume that they would, at some point during their lives, be responsible for the economic support and the care and nurture of their own immediate descendants, should they have any. They cannot reason without regard to the existence of such facts because their task is to devise principles of justice appropriate for a well-ordered society, and such a society, by definition, is one which *strives to reproduce itself together with its social and cultural life through succeeding generations*. It would, therefore, appear that their reasoning must reflect their recognition of these facts, irrespective of the fact that they are, at no point, acknowledged by Rawls.

This seeming impasse may, of course, be resolved in what might be termed a linguistic way, by insisting that, while certain fundamental facts are without doubt an enduring and necessary feature of human life, they in no way affect the choice of appropriate principles. In essence, Rawls tacitly proceeds upon this basis. The problem with this procedure is that it must be seen to be inadequate once we recognize that a significant cause of the injustice in existing societies is a direct consequence in the social and cultural allocation of the obligations which follow from the basic facts of social reproduction. Given that specific gender roles are

114 *Ibid.*, 536.

socially constructed and determined, not biologically innate, it follows that the social mechanisms for meeting these obligations, like other social institutions, may be just or unjust, and we need standards by which their relative justice may be ascertained. The justice or otherwise of existing family structures may, in substantial part, be ascertained by examining their impact upon distributive outcomes.¹¹⁵ Now what I am arguing here is that rational individuals, unaware of *inter alia* their biological sex and of the prevailing social construction of gender roles, would wish to ensure that these 'morally irrelevant' characteristics had no effect upon their ultimate share of the benefits of social cooperation.

Rawls, in addressing the role of the reasonable in a conception of fair terms of social cooperation, comments that

*fair terms of cooperation articulate an ideal of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion as judged by a suitable benchmark of comparison.*¹¹⁶
[Emphasis mine.]

Among those common burdens which must be shared if this ideal of reciprocity and mutuality is to be attained are the obligations inherent in the social reproduction of future generations, the dual obligations of economic support for one's descendants and of providing one's descendants with physical care and nurture. It seems to me plausible that a suitable benchmark of comparison, given the construction of the parties as free and equal moral persons, and taking the potential existence of these facts, or, if the term is preferred, common burdens, as influencing the deliberations of the parties, would be the situation which would obtain if such were equally shared. Adopting a position of absolute equality as a benchmark has the advantage of ensuring that later, at the constitutional and legislative stages, appropriate guarantees can be incorporated in response to the constraints of the reasonable. This approach suggests that, while in a truly well-ordered community, citizens would to the greatest extent possible individually meet their obligations to provide any children they might have with economic support and care and nurture, in existing societies in which these burdens are not equally shared, and, as a consequence, the benefits of cooperation are unjustly distributed, redistribution would be required to place the parties in the position which they would have occupied had a just distribution taken place. This comparison, within Rawls' framework, would be made upon the basis of the access of those affected to the primary goods.

With this in place, a further modification to the structure of Rawls' account becomes inevitable. As it stands the two limbs of his account of distributive justice are the principle of

115 I ignore for the present other manifestations of serious injustice within families which could, I believe, if the political will existed, be adequately addressed by existing institutions. That the political will does not exist, of course, reflects precisely existing preferences.

116 Rawls, 'Kantian Constructivism in Moral Theory', *loc. cit.*, 528.

equality of fair opportunity and the difference principle. On the account developed in the last few paragraphs, at least if we look at existing unjust societies, we recognize that not only are such societies stratified into broad economic groups or classes as measured by the access of households to income and wealth, but also each of these broad economic groups is internally stratified by the gendered division of labour and the economic and other disadvantages which attend this. Thus, we recognize that two distinct *foci* of potential disadvantage exist, the first determined by the position of each household in the wider community, and the second determined by the gendered division of labour within the household and the impact of this upon the access of individuals to the basic social goods, including, I think, the social allocation of leisure¹¹⁷ inclusion of which becomes critical for the coherence of the structure as a whole. Given the background constraint I argued was essential to the idea of fair terms of cooperation - that the burdens involved in the reproduction of subsequent generations would be equally shared by all who became parents, absolute equality in this respect seems an appropriate benchmark, particularly given that, on the whole, individuals tend to enter more or less intimate relationships with those of roughly similar backgrounds and education.

A further potential difficulty arises with regard to another of the assumptions incorporated in Rawls' basic theory. Rawls, as is well known, assumes that the position of representative individuals may be sufficiently defined by the position of equal citizenship and their position in the distribution of income and wealth to avoid indexing problems.¹¹⁸ While this may, and I reserve judgment in this matter, be sufficiently precise to determine the relative positions of Rawls' 'representative men', it appears counterintuitive once we recognize that two distinct *foci* of relative disadvantage must be considered, that determined by the overall position of households within the community, and that determined by the gendered division of labour within the community, whatever specific form it may take. Provision could be made to ensure equal access to income and wealth irrespective of gender at all broad socio-economic levels, for example the sort of redistribution suggested by Okin's proposal, without such redistribution in any way affecting the access of women to other social goods, particularly such goods as '*powers and prerogatives of offices and positions of responsibility, particularly those in the main political and economic institutions*'.¹¹⁹ One of the characteristic features of existing, unjust societies, is that women, irrespective of their access to income and wealth, have significantly diminished access to such offices when their position is compared to that of men of equivalent education and background. While this may, of course, suggest simply that women have very little interest in such offices, it may also suggest a culturally entrenched belief that such positions are inappropriate for women, most particularly where by virtue of such they

117 Here I am assuming that any reasonable account of leisure as a primary good would be constructed to recognize child care and essential household tasks as work.

118 Rawls, *A Theory of Justice*, *loc. cit.*, 96.

119 Rawls, 'Social Unity and Primary Goods', *loc. cit.*, 162.

would exercise socially legitimate power over men.¹²⁰ What must be emphasized here is that unless and until culturally entrenched attitudes concerning gender and appropriate gender roles are significantly modified, fair equality of opportunity will remain neither fair nor equal. Inevitably, it will be corrupted by the inequalitarian attitudes which prevail within the community, and it may be, given the prevalence of such attitudes, that preference and positive action are essential.

Once Rawls' account has been expanded in these ways, a further problem arises. While maximin may be an appropriate criterion for inequalities within the society as a whole, it intuitively seems far less clear that it is adequate when dealing with disadvantages arising from gender. First, the underlying assumption of maximin is that any inequality is acceptable only to the extent that such inequality is to the benefit of the least advantaged group, that is to the extent that their prospects given the inequality are preferable to their prospects without it. The supporting argument is that the more fortunate are entitled to gain from their greater talents and more advantaged starting positions only to the extent that allowing them to do so benefits the less fortunate. It seems fairly clear that the distribution of talents between men and women is roughly equivalent, and that boys and girls have a roughly equal chance of being born into generally advantaged or disadvantaged family circumstances. Gender based disadvantages arise, not from the 'natural lottery', nor from differences in family socio-economic background, but from the social allocation of burdens and benefits as determined by prevailing gender roles.¹²¹ They are, in other words, a consequence of culturally entrenched injustice. It would seem to follow, therefore, that the justification supporting maximin has no application to the case we are considering. It is important to be extremely precise about the exact parameters of my claim. Undeniably, within particular families given the prevailing (unjust) gendered distribution of labour, the greatest benefit in terms of the access of the household to income and wealth may be realized for the household if traditional roles are adhered to. It does not follow, of course, that this may be perceived as just. It must be emphasized further that in such households, disparities in individual access to the other primary goods are likely to be profound, indeed, are likely to be substantially greater than would be the case if roles were less traditional. It is as individuals, not households that people have access to, for example, offices and positions of responsibility. When we recognize that the overall economic position of any given household may, under present conditions, be maximized by a distribution of labour which simultaneously minimizes the access of one family member to offices and positions of responsibility, Rawls' assumption that access to the other primary goods is sufficiently correlated with access to income and wealth to avoid indexing

120 For an account which emphasizes male resentment of women in senior or supervisory positions see P.N. Graboski, 'The Harassment of Jane Hill' in P.N. Graboski, *Wayward Governance*, Canberra, Aust. Institute of Criminology, 1989, 173.

121 Biological sex is allocated by the 'natural lottery', so-called, while gender is entirely socially constructed.

problems may be seen to be fallacious. Once one moves from considering the individual household to considering the gendered distribution of labour within the society as a whole, given the fact that it operates more or less independently of the distribution of talent and the advantages of social background, there is no reason to suppose that, on the macro-institutional level, allowing inequalities to continue would be likely to operate to the advantage of the least advantaged group, even in the very long term. A significant effect of the existing gendered distribution of labour is the fact that women are less likely, at all levels in society, to make full use of their natural capacities or talents, and, in many cases, the advantages conferred by social background, or cultural capital, also remain underutilized. If as Rawls supposes, inequalities can only be justified if it can be established that allowing them will operate to the benefit of the less advantaged, effectively they can be justified only when it is supposed that a significant effect will be to increase the overall wealth of the community. Underutilizing the talents and cultural capital of a substantial proportion of the community seems more likely, in the very long run at least, to diminish the social resources available to the community as a whole and this diminution is ultimately likely to rebound to the disadvantage of the least advantaged group.

ADD WOMEN AND STIR: DWORKIN AND OBLIGATIONS

Dworkin's account of equality of resources incorporates very different presuppositions and it is therefore important to examine these features of his account in some detail. Where Rawls' account utilizes the device of the original position to constrain reasoning, Dworkin's ideal theory account offers a group of adult shipwreck survivors washed up on a desert island with abundant resources and no other human inhabitants. These shipwreck survivors seek to define a just distribution of the available resources among themselves, and Dworkin explicitly avoids consideration of intergenerational matters, including the question of how equality of resources is to be maintained if individuals remain free to give their resources to their children during life or after death. He argues that the '*idea of an economic market . . . must be at the center of any attractive theoretical development of equality of resources.*'¹²² While these castaways are fully aware of their own individual preferences, and, indeed, must be so aware if Dworkin's auction is to serve its purpose, they do agree that none among them has any antecedent claim to any of the resources and that the available resources must, therefore, be divided equally among them. The metric for an equal division Dworkin terms the envy test. Whereas the original position endeavours to ensure that reasoning is constrained by the fact no one is aware of his or her position, or natural attributes, or individual preferences, Dworkin's castaways make their decisions upon the basis of their individual tastes and ambitions, given the preferences of the other castaways and the opportunity costs their decisions impose upon others.

The proposition for which I argued above, that, in the original position individuals unaware of their biological sex and the gender roles characteristic of their society, would insist that the obligations of parenthood be equally shared among all those who became parents, is clearly untenable in the context of equality of resources. Given that, at the ideal theory level, the castaways are fully aware of their own preferences, and make their decisions on the basis of their preferences as regards work, leisure and consumption, it appears that decisions regarding parenthood and regarding the ways in which parental obligations are met would depend entirely upon the preferences of the individuals concerned. As Dworkin notes, the critical distinction in his theory

*is the distinction between those beliefs and attitudes that define what a successful life would be like, which the ideal assigns to the person, and those features of body or mind or personality that provide means or impediments to that success, which the ideal assigns to the person's circumstances.*¹²³

On its face, because even at the ideal theory level all decisions are made in full awareness of individual ambitions and preferences, equality of resources appears substantially more hostile than did Rawls' account towards the proposition I am putting, that any coherent egalitarian account must incorporate at the ideal theory level recognition of the obligations of all individuals towards any children which they may have. Despite this apparent incompatibility, I shall argue that equality of resources in fact requires just such a background theory of equality of responsibilities if it is to provide an attractive theoretical model for equality.

Let us return to the castaways or shipwreck survivors with whom we began. Dworkin specifies that at the very least they are to assume that '*any likely rescue is many years away*'.¹²⁴ Unless we are to also assume that these castaways are either celibate or neuter, it seems probable that after the initial distribution is complete and they are free to produce and trade as they wish, some, perhaps most, of them will, in the course of using the time available to them for 'leisure', form relationships and have children.¹²⁵ Certainly a 'preference' for more or less permanent relationships and for reproduction is one characteristic of the great majority of known human communities. Given that our castaways are fully aware of their existing preferences, and have agreed to an equal division of resources, and given that Dworkin specifies that the '*idea of pre-political entitlement based on something other than equality*',¹²⁶ is incompatible with his account, how might our immigrants, realising this, ensure that such

¹²³ *Ibid.*, 303. More generally see 295-304.

¹²⁴ *Ibid.*, 285.

¹²⁵ Dworkin's elaboration of the supporting principles and baseline constraints essential if the auction is to actually attain an equal division of resources emphasizes, particularly in his account of the principle of authenticity, such relational concepts as convictions, commitments, associations and, in particular, freedom of personal, social and intimate association. Dworkin, 'The Place of Liberty', *loc. cit.*, 34-37.

¹²⁶ Dworkin, 'Equality of Resources', *loc. cit.*, 312.

relationships would not destroy equality of resources among them? As Dworkin acknowledges, equality of resources is an interpretation of a more fundamental egalitarian principle, that a community is required to treat each of its members with equal concern.¹²⁷ What is required is a set of baseline requirements for our imaginary auction which serves as a bridge between the abstract principle of equal concern *'and equality of resources, which proposes that an auction under certain conditions realizes equal concern.'*¹²⁸ It is through the construction of an appropriate baseline that this bridge is constructed.

Earlier we identified a number of principles which are essential to the construction of an appropriate baseline for the auction, the principles of security, abstraction, correction, authenticity and independence. The principle of security refers simply to the familiar legal prohibitions against theft, the use of force and so on which have become conventional in developed legal systems. It provides individuals with the physical security and control over their property essential if they are to form plans and projects and carry them out. Abstraction is more complex. It requires that all resources be offered in their most abstract or least differentiated form. Thus, for example, land ought to be offered in smaller rather than larger lots because this enables maximum flexibility and enhances the sensitivity of the auction procedure to individual plans and projects. The principle of abstraction attempts, so far as is possible, to ensure that all resources are offered in the least differentiated and most fully fungible form possible. It incorporates a general presumption of freedom of choice, ensuring that individuals will be left free to use all the resources they acquire, including leisure, in any way they wish which is compatible with the principle of security. The principle of correction was addressed earlier. Fundamentally the principle of correction mandates constraints on freedom of choice where this is essential to correct for externalities such as transaction costs and where necessary to move outcomes closer to those which would obtain under conditions of perfect knowledge and prediction and devoid of organizational costs. It incorporates such restrictions upon freedom as zoning requirements and the restrictions on user implicit in the availability of nuisance actions.

Authenticity, as Dworkin uses it, has become a technical term. A personality is authentic in Dworkin's terms, when it *'has been formed under circumstances . . . appropriate to using an auction among personalities so formed as a test of distributive equality.'*¹²⁹ While this statement is, on its face, somewhat mysterious, what Dworkin is trying to suggest is that personalities formed under unjust legal constraints such as those mandating racial segregation or outlawing homosexual relationships are not authentic, have been corrupted by the illegitimate constraints in force. The preferences expressed by personalities formed under

127 Dworkin, 'The Place of Liberty', *loc. cit.*, 25 ff.

128 *Ibid.*, 25.

129 *Ibid.*, 35.

such conditions have no role in an ideal theory auction used to establish an egalitarian distribution. Finally, the principle of independence acts both to ensure that no constraints can be justified *'as necessary to reach a result that would be reached in an auction . . . if that result would be reached only because people's bids would reflect contempt or dislike'* for those disadvantaged thereby and to endorse the constraints essential to protect those who are the victims of prejudice.¹³⁰

Dworkin argues further that equality of resources

*aims that the resources people have available, with which to pursue their plans or projects or way of life, be fixed by the costs of their having these to others. . . . [and that it follows from this aim that] each person's social requirements . . . be tested by asking how far these requirements can be satisfied within an egalitarian structure that measures their cost to others.*¹³¹

It follows that *'the baseline liberty/constraint system should be innocent of any constraints justified on grounds of religious truth or moral virtue.'*¹³²

At this point, it is important to return to our original question and attempt to see whether the basic proposition for which I am arguing might find a home within the baseline liberty/constraint system. I have argued that given the basic facts of human life all those who have children have two obligations in respect of those children, to provide for their support and to provide for their care and nurture. A similar proposition could, of course, be put in a way more congruent with Dworkin's theory, taken as a whole, that all children have a right to economic support and to care and nurture from their parents. Does it make a significant difference whether this principle is phrased in terms of the obligations of adults to any children they may have or whether it is phrased in terms of the right of children to economic support and to care and nurture? Given the possibility of alternative accounts, this question becomes one of some importance. I would argue that there is a critical difference between the two propositions. When phrased as I prefer, as an obligation upon the part of each parent as an individual to provide both economic support and care and nurture, the obligation is fully individualized, applies equally and individually to each and every individual who is a biological or social parent. Where the proposition is phrased in terms of the child's right to economic support and care and nurture, it need not be individualized in this way. The second proposition slides quite easily into a subtly different formulation, that each child has a right to economic support and care and nurture from his or her parents, suggesting that nothing whatever follows from the way in which parents choose to perform this obligation. Where it is the right of the child which is central, so long as the child receives both support and care and

130 *Ibid.*, 36-37.

131 *Ibid.*, 30-31.

132 *Ibid.*

nurture, the particular allocation of responsibilities is irrelevant. The obligation on the part of the parents is not necessarily individualized, although it may be individualized where necessary.¹³³ I do not believe that anything would necessarily follow from incorporating the second form in the baseline. The way in which the derivative obligations were fulfilled, the particular allocation of social responsibilities, would simply be a matter of choice and negotiation between the parents and any distributive consequences irrelevant to equality of resources. If, however, each individual were seen as potentially having an obligation to provide both economic support and care and nurture for any children for whom he or she was responsible, people would be required to assess the social requirements of the sorts of life they wish to lead against the costs these requirements potentially impose upon others. An individual who chose both to have children and to devote his or her life whole-heartedly to his or her chosen occupation either for the intrinsic rewards it might bring or in order to amass the resources needed to indulge the forms of consumption preferred would be required to consider the cost that this lifestyle imposed upon others. These costs would include the true cost of any opportunities foregone by others in order to make this lifestyle possible. Dworkin's baker, who chooses *'to work long hours rather than watch football on television'*,¹³⁴ might, for example, be required to take into account the costs this particular decision imposes upon other family members, just as he might be required to take into account the costs a choice in favour of leisure rather than participation in parenting and household labour might impose. His choices in work and leisure become, not simply individual preferences, but concrete choices with the capacity to impose significant costs upon others.

Would this interpretation of true opportunity costs be acceptable within the framework of Dworkin's account taken as a whole? The arguments put above suggest that where the obligations of parenthood are not equally shared between parents, compensation is essential to maintain equality of resources between them. Yet, within Dworkin's theory as a whole, it is not altogether clear that compensation is justified. Dworkin places overwhelming emphasis upon individual freedom of choice. His entire account of equality of resources is intended to secure the greatest possible role for individual preferences in determining social outcomes, given the tastes and preferences of others. It is frequently asserted that the traditional social allocation of the obligations of parenthood in our culture reflects the preferences of both men and women. Women, it is argued, prefer to devote themselves to the care and nurture of their children while men prefer to meet their parental responsibilities

133 Dworkin distinguished between the consequences of the two approaches in this way. Arguing generally he commented: *'Duty based theories treat such codes of conduct as of the essence. . . . Right-based theories, however, treat codes of conduct as instrumental, perhaps necessary to protect the rights of others, but having no essential value in themselves. The man at the center is the man who benefits from others' compliance, not the man who leads the life of virtue by complying himself.'* *Taking Rights Seriously*, loc. cit., 172.

134 Dworkin, 'The Place of Liberty', loc. cit., 46.

through the provision of economic support. If these are in fact the preferences of the individuals concerned, may it not be argued that no compensation is required?¹³⁵ In addressing the principle of authenticity, Dworkin comments that

*any auction scheme approved by equality of resources requires, for example, some baseline principle specially protecting the parties' freedom to engage in activities crucial to forming and reviewing the convictions, commitments, associations, projects, and tastes that they bring to the auction.*¹³⁶

He acknowledges using authenticity in a special sense, one which focuses upon the absence of legal constraints on such activities, simply stating that for the purpose of exploring how government treats people as equals the exclusive focus upon legal constraints is appropriate. Here, I believe, Dworkin is in error. While he acknowledges that most personality-forming constraints are in our culture, cultural rather than legal, he suggests that our concern with political equality entitles us to disregard the effect of these broader non-legal constraints on personality formation. Earlier in this chapter I argued at length that many of the cultural constraints together with the preferences generated by them which are confronted by women today are in fact a product of earlier legal constraints and the inequalities attitudes these reinforced and justified. These 'cultural relics' are at least as likely to distort prices away from true opportunity costs as are existing legal constraints. Further, in the specific context we are considering, many of these cultural constraints are a direct consequence of the inequalities attitudes he subsequently argues are condemned by the principle of independence.¹³⁷ If this is the case, a very serious problem arises, one which, I believe, arises more acutely where gender roles are concerned than in other circumstances. Even if we accept *arguendo* the proposition that traditional gender roles together with the social allocation of resources and opportunities which accompanies them do represent the existing tastes or preferences of many of the individuals concerned, taken one by one, we are confronted by the possibility that these tastes or preferences are not authentic but are, instead, a consequence of the inequalities attitudes the principle of independence argues we are to condemn. What I am arguing here is simple. The tastes and preferences of individual men and women in respect of appropriate gender roles and the social allocation of resources and opportunities associated with such roles are not independent of the inequalities attitudes and beliefs which have played a role in their construction. Rather, those same inequalities attitudes reinforce and encourage the social reproduction of those same tastes and preferences and proclaim them normative. It would

¹³⁵ I leave aside for the moment sociological evidence suggesting that an increasing proportion of women would in fact prefer that men shared equally in care and nurture and desire to pursue their own careers irrespective of parenthood. See A Hochschild, *The Second Shift: Working Parents and the Revolution at Home*, New York, Viking Press, 1989.

¹³⁶ Dworkin, 'The Place of Liberty', *loc. cit.*, 34-35.

¹³⁷ *Ibid.*, 37.

appear to follow that equality of resources cannot be neutral concerning these tastes and preferences, at least where they are likely

*to distort prices fundamentally, because they affect what people decide they want, and therefore change the entire bidding program they decide to pursue.*¹³⁸

Yet Dworkin specifically defines his principle of authenticity in terms of the absence of legal constraints and for what are perhaps sound and traditionally 'liberal' reasons insists that other cultural and psychological constraints are irrelevant, irrespective of the extent to which they may distort the outcome of the auction.

It becomes, therefore, critical to consider what some of these reasons might be. Dworkin himself provides only one. He insists this limitation is appropriate because the topic being considered is what is required if the government is to treat its citizens as equals in the scheme of resources it devises. Once cultural and psychological constraints upon personality formation are considered, it may seem that we have embarked upon a metaphysical or psychological account of authenticity and the information required to ascertain whether the principle of authenticity had been complied with would require an account of the preferences individuals ought to have, completely undermining the project upon which he has embarked. Perhaps. However before we simply assume that this restriction is reasonable and essential, it is well to consider precisely what is at stake. Two examples should suffice by way of illustration. First, to the extent that cultural traditions which are still prevalent regard dependence as appropriate for women, and only for women, to the extent that girls are encouraged from early childhood to perceive their true vocation to lie in marriage and motherhood, it seems entirely likely that these cultural traditions will have a profound bearing not only upon the choices they as individuals make in work, leisure and consumption, but also upon the preferences and attitudes of others towards them as occupants of various social roles. Likewise, to the extent that men are encouraged to perceive themselves as independent, encouraged to perceive their occupational choices as critical to their identity and their family roles and responsibilities as peripheral, these attitudes or beliefs are equally likely to have a profound bearing upon their choices, and upon the attitudes of others towards them. It goes without saying that such attitudes are likely to have a profound impact both upon the choices which are made in terms of work, leisure and consumption, and upon the preferences of those dealing with them. To the extent that such beliefs are widespread in a given community, as I believe they are in ours, they seem likely to have a radical impact upon outcomes in the ideal theory auction Dworkin proposes and upon ongoing trade thereafter. A similar argument is undeniably available concerning the impact of racist attitudes. For example, to the extent that the preferences of members of any given racial group are formed within a community that believes that members of that group are unreliable, or less intellectually capable on average than members of the dominant group, or fundamentally shiftless and happy-go-lucky, it seems

likely that the preferences of many group members will be profoundly affected by beliefs which they have absorbed concerning the characteristics of their racial group. To the extent, if any, that this is somewhat less intuitively persuasive with regard to racial or ethnic stereotypes than with respect to gender roles, it is important to recall that the best available evidence suggests that our consciousness of gender and of the roles connected with gender apparently is formed at the same time as is our consciousness of ourselves as distinct individuals, whereas, at least in relatively fortunate circumstances, our consciousness of race and its consequences need not arise until later. There is, perhaps, one further difference which I ought to mention for the sake of completeness. Very often, members of racial or ethnic minorities who demonstrate substantial attainments in the wider community are perceived either as demonstrating the fallacious nature of racial and ethnic stereotypes or as truly exceptional individuals. Women who demonstrate equivalent attainments are not infrequently perceived as unnatural, unfeminine, as not properly female. Their attainments identify them as deviant, rather than exceptional.

Dworkin, in addressing the principle of independence, argues that it redefines opportunity costs where this is necessary to protect those who are the victims of systematic prejudice.¹³⁹ It follows that a way must be found of placing those who are victims of prejudice in a position which at least approximates that which they would occupy if prejudice did not exist. What I am arguing is that in the context of gender difference, an appropriate means of accomplishing this lies in recognizing that the principle of authenticity requires a very specific constraint. Dworkin comments that the principle of authenticity has both an active and a passive voice. Not only would participants want the widest possible opportunities to form and reflect upon their own convictions, attachments and projects, they would also desire a similar opportunity to influence the opinions of others.¹⁴⁰ Given the degree to which the gender roles which remain conventional in our culture affect the concrete nature of these convictions, attachments and projects, and given the degree to which they have in our culture determined the actual influence people have upon the opinions of others, the auctioneer would be required to correct in advance for the influence of these roles in fixing the baseline constraints precisely because of these cultural characteristics. A reasonably simple way of attaining this would be for the auctioneer to redefine opportunity costs upon the basis that the great majority of individuals will, at some time during their lives, be obligated to provide both economic support and care and nurture for their children, that is, will be in the position of sole parents who are

139 *Ibid.*, 37.

140 *Ibid.*, 35. I note here that Dworkin intends the principle of authenticity to provide the familiar liberal protections for freedom of religion, expression, and personal, social and intimate association. I believe, however, given the argument put in the text, that authenticity requires that individuals make their choices in work, leisure and consumption against the knowledge of their background obligation, should they become parents, to provide both economic support and care and nurture for any children they may have. Without this constraint, the gender roles characteristic of our culture are likely to distort prices fundamentally.

unable to rely upon any family support network and must plan accordingly.¹⁴¹ The probability of parenthood and the approximate costs of raising children could surely be calculated from existing statistical information and from the auctioneer's comprehensive knowledge of all relevant particulars concerning each of the immigrants. On the ideal theory level, therefore, individual decisions in work, leisure and consumption would reflect these opportunity costs and it follows that institutional structures would develop to facilitate an egalitarian distribution of these costs. I believe this is implicitly necessitated by Dworkin's definition of authenticity. He comments that

*personalities are authentic, for our purposes, when they have been formed under circumstances appropriate to using an auction among personalities so formed as a test of distributive equality.*¹⁴²

Personalities constructed in terms of prevailing gender roles cannot be deemed authentic by this standard, tending as they do to reinforce inequality.

It remains to consider the extent to which the modifications argued for in the paragraphs above are consistent with the structure of Dworkin's theory of equality, taken as a whole. Two elements of these modifications are particularly critical. First, I have argued that recognition of the impact of gender and gender roles upon equality of resources mandates the recognition of two fundamental individual obligations, the obligation to provide economic support and to provide care and nurture for any children one may have. Second, I have argued that, if Dworkin's ideal theory auction is to provide an adequate account of true opportunity costs, it is essential, at least in the context of gender and gender roles, that the principle of authenticity incorporate the recognition that, in cultures such as our own, existing preferences and choices which in any way implicate issues concerning gender cannot be recognized as authentic because the attitudes underlying them are among those which the principle of independence insists that a government dedicated to showing equal concern for all its citizens must condemn. While these are certainly preferences and choices, to the extent to which they flow from inequalitarian attitudes, and to the extent that, absent those attitudes, they would be otherwise, they cannot be regarded as authentic. *In the case of gender and gender roles at least, it is impossible for equality of resources to remain neutral about the tastes which impose economic disadvantage while still condemning the attitudes which have formed those tastes and preferences.*

¹⁴¹ The rationale is simple. A sole parent unable to rely upon the services of kin, a necessary constraint given that very often the services of female kin are relied upon without compensation in our culture, would be compelled to find a way of reconciling the support obligation and the obligation to provide care and nurture. A community in which individuals perceived themselves as actually or potentially having these responsibilities would demand institutional restructuring to make this possible.

¹⁴² Dworkin, 'The Place of Liberty', *loc. cit.*, 35, n. 32.

The incorporation of fundamental obligations, even abstractly defined, in a theory which insists upon the primacy of individual rights and their prior status to any obligations which may flow from those rights, while superficially inconsistent, does not, I believe, pose any significant theoretical problem. Indeed, it has been argued that recognition of these obligations may plausibly be seen as arising from the fundamental obligation of government to show equal concern for its citizens. Unless, that is, these individual obligations are fully recognized and provided for in the institutional structure of the community, government cannot be thought to demonstrate equal concern. The second problem is much more difficult and significant. If, as I have attempted to demonstrate throughout this thesis, those preferences and choices which currently prevail within communities such as ours concerning the appropriate sexual division of labour, concerning appropriate roles both within the family and within the wider community, are in fact a consequence of attitudes and assumptions which are fundamentally inegalitarian, two conclusions follow. First, the distinction between the tastes and preferences which prevent the services of some individuals from commanding a premium in the market and the inegalitarian attitudes which, at least in the case of gender, model those tastes and preferences may be unworkable. Second, the principle of authenticity, if it is to do the work required of it, cannot be interpreted simply as a justification for

*affording special protection to freedom of religious commitment, freedom of expression, access to the widest available literature and other forms of art, freedom of personal, social and intimate association, and also freedom of nonexpression in the form of freedom from surveillance.*¹⁴³

Rather, at the ideal theory level, the principle of authenticity commands attention to the profound interrelationship between fundamentally inegalitarian attitudes and the expression of tastes and preferences. It calls into question, for example, protection for literature and art which relies for its appeal on the inegalitarian attitudes Dworkin insists equality of resources condemns and which effectively fosters the continued prevalence of tastes and preferences ultimately predicated upon inegalitarian attitudes.¹⁴⁴

CONCLUSION

While it is certainly possible to 'add women and stir', as we have seen in this chapter doing so alters the emphasis and direction of at least two egalitarian theories in significant ways. In the case of Rawls, while nothing in the construction of the original position or the constraints upon reasoning which prevail prohibits the incorporation of recognition of the distributive consequences of gender roles, inclusion renders untenable a series of critical assumptions upon which other aspects of his account rely and calls into question critical

143 *Ibid.*

144 I think here of forms of racist expression which unfortunately remain commonplace and also of forms of expression which rely for their appeal upon stereotypic characterizations of women.

aspects of his argument that a stable overlapping consensus is possible. Likewise, while Dworkin's ideal theory account of equality of resources can be interpreted in a way which not only allows, but requires, such recognition, recognition lays bare the intimate interdependence of certain egalitarian attitudes and the expression of tastes and preferences which is intended to define an egalitarian distribution of social goods and resources. Many of these attitudes undeniably have their genesis within the private family given its primary cultural role in the socialization of future generations, but their ultimate expression pervades the social, economic and political life of the wider community. They find concrete expression in many of the prevailing tastes and preferences of individuals for work, leisure and consumption and for the forms of these which are appropriate for particular individuals. This, of course, is neither new nor particularly surprising.

Quite clearly, in making these arguments, I am not reaching back to republican sentiments or forward to communitarian yearnings. Indeed, to the degree my arguments have succeeded, the foundation for communitarian yearnings has, to some extent, been undermined. What I have argued throughout is that the liberal faith in a coherent public/private distinction is, to a substantial extent misplaced, and to the extent that it is misplaced, the contemporary egalitarian faith in a political account of liberalism is misplaced as well. I have attempted to argue that the contemporary family is to a significant extent the product of the legal institutions and the ideologies which evolved coevally with it. The gender roles which prevailed in the past and those which are significant today are neither somehow the outcome of the interaction of individual tastes and preferences nor are they in any simple sense the outcome of those forms of legal regulation thought to be most characteristically law like. Rather, legal regulation has been subtly influenced by ideologically based normative propositions concerning the family and family roles, and, in turn, prevailing ideologies have been subtly modified by changes in legal regimes. Further, the most pervasive forms of regulation have gradually ceased to substantially rely upon 'black letter law'. Increasingly, legislative regimes emphasize broad areas of discretion in pursuit of substantive goals (which are, in large part, ideologically determined). Family regulation reflects the interaction of ideological fragments which to a greater or lesser extent serve the perceived interests of wider institutions. Prevailing gender roles and the concrete tastes and preferences associated with various permutations of these in no sense arise autonomously and ought not be thought to be in some fundamental way an expression of the individual will. While, at least within more or less pluralist societies such as our own, gender roles are neither monolithic nor immutable and may be becoming increasingly variable, the construction of those roles arose out of more or less dominant ideologies and the shadow of these ideologies remains with us today and underlies institutional expectations. We have seen this in many different contexts, in the ideological definition of motherhood as a vocation, and the very different consequences of this for different social classes, in the ways in which roles such as wife, mother, father and worker have been constructed around networks of expectations and obligations which frame political discourse. Despite the increasing prevalence and breadth of legislative prohibitions of sexual

discrimination and/or harassment, occupational roles continue, in substantial part, to be predicated upon the assumption that workers are able to rely upon the domestic and parenting services of others.

When we 'add women and stir', insist that the fact of disadvantage cannot be addressed without attention to the causes of that disadvantage and the role of law in orchestrating family structures and ideologies, a significant consequence is that many of the structural assumptions underlying egalitarian theorizing are called into question. In the case of Rawls, the recognition of dual *foci* of disadvantage calls into question both the assumption that roles other than that of citizen and that in the distribution of income and wealth are voluntarily assumed and the related assumption that the connection between access to income and wealth and access to the other social goods is sufficiently close for theoretical reliance upon income and wealth alone. Also thrown into quite fundamental question is his tacit view that most of the theories of the good life characteristic of contemporary pluralist communities are fundamentally compatible with the ideals of political liberalism.

In the case of Dworkin, exposure of the link between inegalitarian attitudes and other tastes and preferences leads to recognition of the fact that, at least in the case of gender, the inegalitarian attitudes liberalism must condemn generate many, perhaps most, of the concrete tastes and preferences liberalism set out to respect. For both, I believe, our exploration into justice for women has emphasized the fundamental incoherence of any attempt to exclude justice from the family and the consequential inadequacy of their accounts of political liberalism. To the extent that contemporary egalitarian theories address the question of justice for women, take women seriously as individuals, the family and the relationships within it cease to be private, beyond the reach of law and justice. Once we recognize that families are composed of a multiplicity of independent individuals, to whom, men, women and children alike, justice is due, the egalitarian faith in a coherent public/private distinction vanishes. All that remains are actually or potentially autonomous individuals to whom justice is due and for whom it is long overdue.

BIBLIOGRAPHY

- Ackerman, B. *Social Justice in the Liberal State*, New Haven, Yale Univ. Press, 1980.
- Allan, G. *Family Life: Domestic Roles and Social Organization*, Oxford, Basil Blackwell, 1985.
- Arendt, H. *The Human Condition*, Chicago, Univ. of Chicago Press, 1958.
- Aristotle, *The Politics*, translated by T.A. Sinclair, revised and re-presented by T.J. Saunders, Harmondsworth, Middlesex, England, Penguin Books, 1981.
- Bentham, J. *Theory of Legislation*, trans. from the French of E. Dumont by R. Hildreth, 5th ed., London, Trubner & Co., 1887.
- 'A Critical Examination of the Declaration of Rights' in Bowring, J. (Ed.), *The Works of Jeremy Bentham*, New York, Russell & Russell, 1962, 497-503.
- Berger, B. & P.L. *The War Over the Family: Capturing the Middle Ground*, Garden City, New Jersey, Anchor Press, 1984.
- Bremmer, C. 'A warp on the wild side', *The Australian*, 27th April, 1989.
- Broome, J.H. *Rousseau: A Study of His Thought*, London, Edward Arnold (Publishers) Ltd. 1963.
- Brown, C. and J.A. Pechman (Eds.), *Gender in the Workplace*, Washington, D.C., The Brookings Institution, 1987.
- Canovan, M. 'Arendt, Rousseau, and Human Plurality in Politics' 45 *The Journal of Politics* 286-302 (1983).
- Cavell, S. *Themes out of School: Effects and Causes*, San Francisco, North Point Press, 1984.
- Charvet, J. *The Social Problem in the Philosophy of Rousseau*, London, Cambridge Univ. Press, 1974.
- Cover, R. 'Foreward: Nomos and Narrative' 97 *Harvard L.R.* 4-68 (1983).
- Crompton, R. & M. Mann (Eds.), *Gender and Stratification*, Cambridge, Polity Press, 1986.
- Dally, A. *Inventing Motherhood: The Consequences of an Ideal*, London, Burnett Books Ltd., 1982.
- Department of the Prime Minister and Cabinet Office of the Status of Women, *Women's Budget Statement*, Canberra, A.G.P.S., 1989.
- Doane, J. & D. Hodges, *Nostalgia and Sexual Difference*, New York, Methuen, 1987.
- Donovan Research 1987, *Child Value Project*, Vols. 1-3, Department for Community Services, Western Australia.
- Donzelot, J. *The Policing of Families*, translated by R. Hurley, New York, Pantheon Books, 1979.
- DuBois, E., Dunlap, Gilligan, MacKinnon & Menkel-Meadow, 'Feminist Discourse, Moral Values, and the Law - A Conversation', 34 *Buffalo L.R.* 11-77 (1985).
- Dworkin, A. *Intercourse*, London, Martin Secker & Warburg, 1987.
- Dworkin, R. *Taking Rights Seriously*, 3rd Impression, London, Duckworth, 1981.
- 'What is Equality? Part 1: Equality of Welfare' 10 *Phil. and Pub. Aff.* 185-246 (1981).
- 'What is Equality? Part 2: Equality of Resources' 10 *Phil. and Pub. Aff.* 283-345 (1981).
- A Matter of Principle*, Cambridge, Harv. Univ. Press, 1985.
- Law's Empire*, London, Fontana Paperbacks, 1986.
- 'What is Equality? Part 3: The Place of Liberty' 73 *Iowa L.R.* 1-54 (1987).
- 'What is Equality? Part 4: Political Equality' 22 *Univ. of San Francisco L.R.* 1-30 (1987).
- 'Liberal Community', 77 *Calif. L.R.* 479-504 (1989).
- 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta L.R.* 324-346.
- Dwyer K. & H. Strang, National Committee on Violence, *Violence Today No. 3 Violence Against Children*, Canberra, Australian Institute of Criminology, July 1989.
- Eekelaar, J. 'Family Law and Social Control' in J. Eekelaar & J. Bell, (Eds.) *Oxford Essays in Jurisprudence*, Oxford, Clarendon Press, 1987, 125.
- Eichler, M. *The Double Standard*, London, Croom Helm, 1980.
- Eisler, R.T. *Dissolution: No-Fault Divorce, Marriage, and the Future of Women*, New York, McGraw Hill, 1977.

- Elshtain, J.B. (Ed.), *The Family in Political Thought*, Amherst, Mass., Univ. of Mass. Press, 1982.
- Family Law Council, *Arbitration in Family Law*, A.G.P.S., 1988.
- Spousal Maintenance Discussion Paper* July 1989, Canberra, A.G.P.S. 1989.
- Farley, R. 'After the Starting Line: Blacks and Women in an Uphill Race' 25 *Demography* 477-495 (1988).
- Finlay, H.A. *Family Law in Australia*, 2nd ed., Sydney, Butterworths, 1979.
- Frayling, C. and R. Wokler 'From the Orang-utan to the Vampire: Towards an Anthropology of Rousseau' in R.A. Leigh (Ed.), *Rousseau After Two Hundred Years: Proceedings of the Cambridge Bicentennial Colloquium*, Cambridge, Cambridge Univ. Press, 1982, 109-124.
- Freeman, M.D.A. *State, Law, and the Family: Critical Perspectives*, London, Tavistock Publications, 1984.
- Freud, S. *On Sexuality*, Harmondsworth, Penguin, 1977.
- Gershuny, J. & J.P. Robinson 'Historical Changes in the Household Division of Labor', 25 *Demography* 537-551 (1988).
- Gilligan, C. *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Harv. Univ. Press, 1982.
- Gilligan, C., J.V. Ward, J.M. Taylor with B. Bardige *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education*, Cambridge, Centre for the Study of Gender, Education and Human Development distributed by Harvard Univ. Press, 1988.
- Glendon, M.A. *The New Family and the New Property*, Toronto, Butterworths, 1981.
- Gittens, D. *The Family in Question*, London, MacMillan Publishers Ltd., 1985.
- Graboski, P.N. 'The Harassment of Jane Hill' in P.N. Graboski, *Wayward Governance*, Canberra, Aust. Institute of Criminology, 1989, 173-184.
- Grimsley, R. *Jean-Jacques Rousseau*, Sussex, The Harvester Press, 1983.
- Hamilton, C. *Marriage as a Trade*, Detroit, Singing Tree Press, 1974.
- Hamner, J. & M. Maynard (Eds.), *Women, Violence and Social Control*, Atlantic Highlands N.J., Humanities Press International, 1987.
- Hirschman, A.O. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Cambridge, Harv. Univ. Press, 1970.
- 'Exit and Voice: An Expanding Sphere of Influence' in A.O. Hirschman (Ed.) *Rival Views of Market Society and Other Recent Essays*, New York, Viking, 1986, 96-98.
- Hobbes, T. *Leviathan*, edited by C.B. MacPherson, Harmondsworth, Middlesex, England, Penquin Books, 1968.
- Hochschild, A. *The Second Shift: Working Parents and the Revolution at Home*, New York, Viking Press, 1989.
- Horowitz, A. *Rousseau, Nature, and History*, Toronto, Univ. of Toronto Press, 1987.
- Horton, A.L. & J.A. Williamson, Eds., *Abuse and Religion: When Praying Isn't Enough*, Lexington, Lexington Books, 1988.
- Hotaling, G.T., D. Finkelhor, J.T. Kirkpatrick & M.A. Straus (Eds.), *Family Abuse and its Consequences: New Directions in Research*, Newbury Park, Sage Publications, 1988.
- Industrial Relations Research Association (Editorial Board K.S. Koziara, M.H. Moskow, L.D. Tanner) *Working Women: Past, Present, Future*, Washington D.C., The Bureau of National Affairs, Inc., 1987.
- Kant, I. *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated by W. Hastie, B.D., Clifton, N.J., Augustus M. Kelley, reprinted 1974.
- Kerr, R. M. LL.D., *The Commentaries on the Laws of England of Sir William Blackstone, Knt., Adapted to the Present State of the Law*, Vol. I-IV, 4th ed., London, John Murray, 1876.
- Kohlberg, L., C. Levine, & A. Hewer, *Moral Stages: A Current Formulation and a Response to Critics*, Contributions to Human Development 10, Basil, S. Karger, (1983).
- Kohlberg, L. *The Philosophy of Moral Development*, San Francisco, Harper and Row, 1981.
- Littleton, C.A. 'Reconstructing Sexual Equality' 75 *Calif. L.R.* 1279-1337 (1987).

- Locke, John *Two Treatises of Government*, a critical edition with an introduction and apparatus criticus by Peter Laslett, New York, A Mentor Book, revised edition, 1963.
- Lyman, P. 'The Fraternal Bond as a Joking Relationship: A Case Study of the Role of Sexist Jokes in Male Group Bonding' in M.S. Kimmel (Ed.), *Changing Men: New Directions in Research on Men and Masculinity*, Newbury Park, Sage Publications, 1987, 149-215.
- MacIntyre, A. *Whose Justice? Which Rationality?*, Notre Dame, Univ. of Notre Dame Press, 1988.
- MacKinnon, C.A. 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' 8 *Signs: Journal of Women in Culture and Society* 635-658 (1983).
- Feminism Unmodified: Discourses on Life and Law*, Cambridge, Harvard Univ. Press, 1987.
- Towards a Feminist Theory of the State*, Cambridge, Harvard Univ. Press, 1989.
- Macfarlane, A. *Marriage and Love in England: Modes of Reproduction 1300-1840*, Oxford, Basil Blackwell, 1986.
- The Culture of Capitalism*, London, Basil Blackwell, 1987.
- McDonald, P. (Ed.), *Settling Up: Property and Income Distribution on Divorce in Australia*, Sydney, Prentice Hall of Australia, 1986.
- Mahoney, K.E. 'Obscenity, Morals and the Law: A Feminist Critique', 17 *Ottawa L.R.* 33-71 (1984).
- Meyers, E.F.K. & D.T. (Eds.), *Women and Moral Theory*, Savage, Md., Rowman & Littlefield, 1987.
- Mill, J.S. & H. Taylor, *Essays on Sex Equality*, edited by A. Rossi, Chicago, Univ. of Chicago Press, 1970.
- Minow, M. "Forming Underneath Everything that Grows": Toward a History of Family Law' (1985) *Wisconsin L.R.* 819-898.
- Minson, J. *Genealogies of Morals: Nietzsche, Foucault, Donzelot and the Eccentricity of Ethics*, London, The MacMillan Press Ltd., 1985.
- Modgil, S. & C. Modgil, *Lawrence Kohlberg: Consensus and Controversy*, Philadelphia, The Falmer Press, 1986.
- Morgan, R. (Ed.) *Sisterhood is Global*, Harmondsworth, Penguin (1984).
- Musgrave, R.A. 'Maximin, Uncertainty, and the Leisure Trade-Off', 88 *Quarterly Journal of Economics* 624-632 (1974).
- National Committee on Violence, *Violence: Directions for Australia*, Canberra, Australian Institute of Criminology, 1990.
- Nead, L. 'The Magdalen in Modern Times: The Mythology of the Fallen Woman in Pre-Raphaelite Painting' in R. Betterton (Ed.), *Looking On: Images of Femininity in the Visual Arts and Media*, London, Pandora, 1987, 73-92.
- Nozick, R. *Anarchy, State and Utopia*, Oxford, Basil Blackwell, 1974.
- O'Brien, M. *The Politics of Reproduction*, London, Routledge, 1981.
- Okin, S.M. *Women in Western Political Thought*, Princeton, Princeton Univ. Press, 1979.
- 'Reason and Feeling in Thinking about Justice' 99 *Ethics* 229-249 (1989).
- Justice, Gender, and the Family*, New York, Basic Books, 1989.
- Olsen, F.E. 'The Family and the Market: A Study of Ideology and Legal Reform' 96 *Harvard L.R.* 1497-1578 (1983).
- The Parliament of the Commonwealth of Australia, *Royal Commission on Human Relationships Final Report*, Canberra, A.G.P.S., 1978, Vol. 5, Part VI
- Getting There: Report of the inquiry into Entry or return to the workforce by Social Security Pensioners*, Canberra, A.P.G.S., 1988.
- Pateman, C. *The Sexual Contract*, Palo Alto, Stanford Univ. Press, 1990.
- Pilling, D. & M.K. Pringle *Controversial Issues in Child Development*, London, Paul Elek, 1978.
- Pitkin, H.F. *Fortune is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli*, Berkeley, Univ. of Calif. Press, 1984.
- Plato, *The Republic*, trans. D. Lee, 2nd ed. (revised), Harmondsworth, Penguin, 1974.
- Rawls, J. *A Theory of Justice*, Oxford, Oxford Univ. Press, 1972.
- 'Reply to Alexander and Musgrave' 88 *Quarterly Journal of Economics* 633-655 (1974).

- 'Kantian Constructivism in Moral Theory' 77 *Journal of Philosophy* 515-572 (1980).
- 'Social Unity and Primary Goods' in A. Sen & B. Williams (Eds.) *Utilitarianism and Beyond*, Cambridge, Cambridge Univ. Press, 1982, 159-185.
- 'The Basic Liberties and their Priority', in S.M. McMurrin (Ed.), *The Tanner Lectures on Human Values*, Vol. III, Salt Lake City, Univ. of Utah Press 1-87 (1982).
- 'Justice as Fairness: Political not Metaphysical', 14 *Phil. & Pub. Aff.*, Summer 1985, 223-251.
- 'The Idea of an Overlapping Consensus', (1987) 7 *Oxford J. of Leg. Stud.* 1-25.
- 'The Priority of Right and Ideas of the Good', 17 *Phil. & Pub. Aff.* (1988) 251-276.
- 'The Domain of the Political and Overlapping Consensus', 64 *N.Y.U.L.R.* (1989) 233-255.
- Reich, C. 'The New Property', 73 *Yale L.J.* (1963) 733-787.
- Reiss, H.S. *Kant's Political Writings*, trans. H.B. Nisbet, Cambridge, Cambridge Univ. Press, 1977.
- Richards, J.R. *The Skeptical Feminist*, London, Routledge & Kegan Paul, 1980.
- Rose, C.M. 'Crystals and Mud in Property Law', 40 *Stanford L.R.* 577-610 (1988).
- Rousseau, J.J. *Emile*, trans. by B. Foxley, Melbourne, Everyman's Library, 1911.
- The Social Contract and Discourses* translated with an introduction by G.D.H. Cole, London, J.M Dent & Sons, 1913.
- The Emile of Jean Jacques Rousseau*, Selections translated and edited by William Boyd, New York, Teachers College Press, 1956.
- The Essential Rousseau*, translated by Lowell Bair, New York, A Mentor Book, 1974.
- Rowland, R. *Woman Herself: A Transdisciplinary Perspective on Women's Identity*, Melbourne, Oxford Univ. Press, 1988.
- Sandel, M.J. *Liberalism and the Limits of Justice*, Cambridge, Cambridge Univ. Press, 1982.
- Scott, H. *Working Your Way to the Bottom: The Feminization of Poverty*, London, Pandora Press, 1984.
- Seager, J. & A. Olson *Women in the World: An International Atlas*, London, Pan Books, 1986.
- Shapiro, I. *The Evolution of Rights in Liberal Theory*, Cambridge, Cambridge Univ. Press, 1986.
- Sirageldin, I. *Non-Market Components of National Income*, Ann Arbor, Univ. of Michigan Survey Research Center, 1969.
- Skillen, A. 'Rousseau and the Fall of Social Man' 60 *Philosophy* 105-122 (1985).
- Smart, C. *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations*, London, Routledge & Kegan Paul, 1984.
- Starke, J.G., Q.C. & P.F.P. Higgins, *Cheshire and Fifoot Law of Contract*, 4th Aust. ed., Sydney, Butterworths, 1981.
- Stiehm, J.H. Ed., *Women's Views of the Political World of Men*, Dobbs Ferry, Transnational Publishers, 1984.
- Straus, M.B. *Abuse and Victimization Across the Life Span*, Baltimore, Johns Hopkins Univ. Press, 1988.
- Straus, M., R. Gelles & S. Steinmetz, *Behind Closed Doors: Violence in the American Family*, Garden City, Anchor/Doubleday, 1980.
- Sydie, R.A. *Natural Women, Cultured Men: A Feminist Perspective on Sociological Theory*, Ontario, Open Univ. Press, 1987.
- Trindade, F.A. & P. Cane *The Law of Torts in Australia*, Melbourne, Oxford Univ. Press, 1985.
- Walby, S. (Ed.) *Gender Segregation at Work*, Stony Stratford, Open Univ. Press, 1988.
- Walzer, M. *Radical Principles: Reflections of an Unreconstructed Democrat*, New York, Basic Books, 1980.
- Spheres of Justice: A Defence of Pluralism and Equality*, Oxford, Martin Robertson, 1983.
- Waring, M. *Counting for Nothing: What Men Value and What Women are Worth*, Wellington, Allen & Unwin, 1988.

- Weitzman, L.J. *The Divorce Revolution: Unexpected Social and Economic Consequences for Women and Children in America*, New York, The Free Press, 1985.
- West, R.L. 'Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision' 46 *Univ. of Pittsburgh L.R.* 673-738 (1985).
- 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', 3 *Wisc. Women's L.J.* 81-145 (1987).
- 'Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement', 54 *Tenn. L.R.* 203-278 (1987).
- 'Jurisprudence and Gender', 55 *Univ. of Chicago L.R.* 1-72 (1988).
- White, J.B. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, Wisc., *Univ. of Wisconsin Press*, 1985.
- Williams, H.L. *Kant's Political Philosophy*, Oxford, Basil Blackwell, 1983.
- Wilson, J. *Information Paper: Time Use Pilot Survey Sydney May-June 1987*, Sydney, Australian Bureau of Statistics, 1988.
- Winnicott, D.W. *The Maturation Process and the Facilitating Environment*, New York, Inter Universities Press, 1965.
- Anon.
- 'Girl free to have abortion without parents' consent', *The Weekend Australian*, 20th-21st May, 1989.
- 'Women's Work is Never Done', *The Mercury*, 6th Feb., 1989.
- 'At \$74,000 lawyers nudge top rung', *The Mercury*, 21st Dec., 1989, 5.
- 'Violence in the home' *Time Magazine*, 5th Sept. 1983, 19.
- 'Mom's Day - In Court', *Time Magazine*, May 15, 1989, 40.
- 'Parents Stake Their Claims', *Time Magazine*, Aug. 7, 1989, 49.

TABLE OF STATUTES

AUSTRALIAN STATUTESCOMMONWEALTH*Income Tax Assessment Act 1936**Social Security Act 1947**Marriage Act 1961**Student Assistance Act 1973**Trade Practices Act 1974**Family Law Act 1975**Sex Discrimination Act 1984**Affirmative Action (Equal Opportunity for Women) Act 1986**Child Support (Registration and Collection) Act 1988**Child Support (Assessment) Act 1989*NEW SOUTH WALES*Consumer Credit Act 1981**Children (Care and Protection) Act 1987*SOUTH AUSTRALIA*Wrongs Act 1936-1975*TASMANIA*Child Welfare Act 1960**Adoption of Children Act 1968*VICTORIA*Community Welfare Services Act 1970**Chattel Securities Act 1981**Goods (States and Leases) Act 1981*BRITISH STATUTES*32 Hen. 8, cap. 28**Statute of Wills (34-35 Hen. 8, cap. 5)*

43 Eliz. 1, cap. 2

30 Geo. 3, cap. 48

Married Women's Property Act 1870 (33-34 Vict., cap. 93)

Custody of Infants Act 1873 (36 Vict., cap. 12)

Married Women's Property Act 1882 (45-46 Vict., cap. 75)

Poor Law Act 1930

National Assistance Act 1948

TABLE OF CASES

Aly v Aly, (1978) F.L.C. 90-519

B.B.I. v J.M.I. (1980) F.L.C. 90-909

Burnicle v Cutelli [1982] 2 N.S.W.L.R. 26

De Shaney v Winnebago Soc. Serv. 489 U.S. 103 L.Ed. 2d 249 (1989)

Devitt v Devitt [1957] Tas. S.R. 11.

Eliades and Eliades (1981) F.L.C. 91-022

Griffiths v Kirkmeyer (1977) 1339 C.L.R. 161

Hodges v Frost (1984) 53 A.L.R. 373

Lochner v New York 198 U.S. 45 (1905)

Muller v Oregon 208 U.S. 412 (1908)

O'Dea v O'Dea (1980) F.L.C. 90-896

Parkes v Parkes (1982) F.L.C. 91-231

Re T. (otherwise H.) (an infant) [1962] 3 All E.R. 970

Tinker v Colwell 193 U.S. 473, 48 L.Ed. 574 (1904)

Wisconsin v Yoder 406 U.S. 205, 32 L.Ed. 2d 15 (1972)